Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

PICARD LOSIER AND ASSOCIATES
Petitioner
V.
GOGOL KALATSCHINOW
Respondent

On Petition For a Writ of Certiorari
To
The Supreme Court
of the
Commonwealth of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

Picard Losier and Associates
1518 Walnut Street, Suite 807
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215-790-9570

QUESTIONS PRESENTED

A. WHETHER THE SUPREME COURT OF PENNSYLVANIA VIOLATED PETITIONER'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEN IT AFFIRMED THE LOWER COURTS' AWARD OF EXCESSIVE PUNITIVE DAMAGES IN CONTRAVENTION OF THE DECISION OF THE UNITED STATES SUPREME COURT IN THE CASE OF STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY V. INEZ PREECE CAMPBELL, ET. AL., 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) .

B. WHETHER THE SUPREME COURT OF PENNSYLVANIA VIOLATED PETITIONER'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEN IT AFFIRMED THE LOWER COURTS' IMPOSITION OF A LESSER BURDEN OF PROOF FOR CLAIMS OF EMOTIONAL DISTRESS IN CIVIL ACTIONS PURSUANT TO THE DRAGONETTI ACT THAN THAT ESTABLISHED FOR CLAIMS OF EMOTIONAL DISTRESS IN OTHER CIVIL ACTIONS?

C. WHICH WHETHER THE SUPREME COURT OF PENNSYLVANIA VIOLATED PETITIONER'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW

UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEN IT AFFIRMED THE LOWER COURTS' DENIAL OF PETITIONER PICARD LOSIER AND ASSOCIATES' PETITION FOR RELIEF FROM DEFAULT JUDGMENT, BASED UPON THE RETROACTIVE APPLICATION OF A RULE OF LAW THAT WAS NOT IN EFFECT AT THE TIME PETITIONER FILED FOR RELIEF FROM DEFAULT, WHICH RULE HAS SINCE BEEN REJECTED BY PENNSYLVANIA'S SUPERIOR COURT?

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Gogol B. Kalatschinow v. Alex H. Pierre, Picard Losier and Associates and Anthony Bombaci, Superior Court of Pennsylvania, Docket Nos. 2993 EDA 2002, 3114 EDA 2002, and 3649 EDA 2002; Opinion and Order of May 18, 2004, affirming in part, vacating in part, the judgment of the Court of Common Pleas, Philadelphia County.

Gogol B. Kalatschinow v. Alex H. Pierre, Picard Losier and Associates and Anthony Bombaci, Supreme Court of Pennsylvania, Docket No. 286 EAL 2004; Order of October 28, 2004, denying Losier's Petition for Allowance of Appeal.

Gogol B. Kalatschinow v. Alex H. Pierre, Picard Losier and Associates and Anthony Bombaci, Supreme Court of Pennsylvania, Docket No. 286 EAL 2004; Order of December 15, 2004, denying Losier's Petition for Reconsideration of Petition for Allowance of Appeal.

BASIS OF JURISDICTION IN THE UNITED STATES SUPREME COURT

The United States Supreme Court has jurisdiction of this matter pursuant to Article III, section 2 of the United States Constitution.

Petitioner Picard Losier and Associates ('Losier') requests review of the December 15, 2004 Order of the Supreme Court of the Commonwealth of Pennsylvania ('Pennsylvania Supreme Court'), in the matter of Gogol B. Kalatschinow v. Alex H. Pierre, Picard Losier and Associates, and Anthony Bombaci, No. 286 EAL 2004. Said order denied Losier's Petition for Reconsideration of the Pennsylvania Supreme Court's decision of October 28, 2004, denying Losier's Petition for Allowance of Appeal from the May 18, 2004 decision of the Pennsylvania Superior Court, affirming the judgment of the Court of Common Pleas of Philadelphia County entered March 25, 2003, in the matter of Gogol B. Kalatschinow v. Alex H. Pierre, Picard Losier and Associates, and Anthony Bombaci, No. 0917, June Term, 2000.

Losier asserts herein that the Pennsylvania Supreme Court, in affirming the judgments of the lower courts, denied him due process and equal protection of the laws, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and in contravention of this Court's decisions in BMW of America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed. 2d 809 (1996), and State Farm Mutual Auto Insurance Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed. 2d 585 (2003).

CONSTITUTIONAL PROVISIONS, STATUTES, AND CODES INVOLVED

1. Article V of Amendment ('The Fifth Amendment') to the United States Constitution provides, in pertinent part, as follows:

"No person shall be...deprived of life, liberty or property, without due process of law;...."

2. Article XIV of Amendment ('The Fourteenth Amendment") to the United States Constitution provides, in pertinent part, as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The Dragonetti Act , Title 42 Pennsylvania Consolidated Statutes Annotated (Pa. C.S.A.), section 8351 et. seq. (see appendix for full text of the statute).

4. The Pennsylvania Rules of Civil Procedure (Pa.R.C.P.), Title 42 Pa.C.S.A. Rules 1-4025 (in effect as of June 8, 2000)

STATEMENT OF THE CASE

On June 8, 2000 Gogol B. Kalatschinow ('Kalatschinow') initiated a civil action in the Philadelphia Court of Common Pleas for wrongful use of civil proceedings and abuse of process pursuant to The Dragonetti Act , 42 Pa. C.S.A. section 8351 et.seq., against Picard Losier and Associates, a sole practitioner law firm owned and operated by petitioner Picard Losier ('Losier'), Alex H. Pierre, Esquire, ('Pierre'), an associate attorney of the firm, and Anthony Bombaci ('Bombaci'), a client of the firm represented by Alex H. Pierre.

Kalatschinow's action was predicated upon a civil action initiated by Pierre on Bombaci's behalf against Sassafras International Café, a restaurant owned by Kalatschinow [Anthony Bombaci v. Sassafras International Café ('Sassafras'), Philadelphia Common Pleas Court, Civil Division, April Term, 1998, No. 1257 ('the underlying action').

In the underlying action, Bombaci, an employee of Sassafras, alleged that after he and Kalatschinow had an altercation regarding another employee, that Kalatschinow assaulted him as he was leaving the restaurant. The underlying action was grounded upon Sassafras' breach of duty to ensure Bombaci's safety, and Kalatschinow was not named personally as a defendant in the underlying action.

Throughout pre-trial proceedings in the underlying action, Bombaci cooperated with Sassafras' investigation of the case. Bombaci presented an affidavit from a friend, Anthony Curci, who stated therein that he had witnessed Kalatschinow's assault against Bombaci Trial Court Opinion (A-1), at . Based upon information Bombaci provided to him regarding his medical treatment and the cost thereof, Losier's associate attorney, Pierre assisted Bombaci in answering interrogatories

propounded by Sassafras. A-1, at). Additionally, Bombaci gave extensive testimony at a deposition regarding the alleged assault, his injuries, and the medical treatment he received, identifying Dr. Yves Jerome as his treating physician (. However, at an arbitration hearing on December 10, 1998, neither Anthony Curci nor Dr. Jerome personally appeared on Bombaci's behalf, and the arbitrators entered judgment for Sassafras International Cafe. Attorney Pierre prepared a notice of appeal and provided it to Bombaci for filing for a trial de novo (A-1, at 3).

As a result of the failure of Dr. Jerome to appear for a deposition, Kalatschinow moved the Court to preclude Bombaci from introducing expert testimony at trial. On March 26, 1999, by agreement of the parties, the Court ordered Dr. Jerome to appear and be deposed.

At the deposition conducted on May 7, 1999, Dr. Jerome testified that when he received a subpoena of Bombaci's medical records in 1998, he searched his files but found that none existed for him, and therefore concluded that he had not treated Bombaci (A-1, at 3). Thereafter, Sassafras and Bombaci, by and through counsel, mutually agreed that Bombaci's suit should be withdrawn. On August 4, 1999, a praecipe to withdraw the appeal from the award of the arbitrators was filed, and on September 12, 1999, the underlying action was discontinued. (A-1, at 4).

On June 8, 2000, Kalatschinow filed the civil complaint for wrongful use of civil proceedings and abuse of process, against Pierre, Losier, and Bombaci. On August 14, 2000, after Pierre, Losier and Bombaci failed to file a responsive pleading to Kalatschinow's complaint, upon praecipe of Kalatschinow's counsel, the Philadelphia Common Pleas Court entered judgment by default against Pierre and Losier (A-1, at 5). Within one

week of the entry of default judgment, on August 21, 2000, Pierre and Losier petitioned the court for relief from default judgment, attaching thereto, and filing simultaneously therewith, a responsive pleading in the form of preliminary objections to the complaint. Pa. R.C.P. 237.3 (b), in effect on the date Losier filed his petition for relief from default, provided, in part, that:

> "if the petition [for relief from default judgment]is filed within ten days after the entry of judgment on the docket, the court shall open the judgment if the proposed complaint or answer states a meritorious cause of action or defense."

Additionally, in the case of Peters Township Sanitary Authority v. American Home and Land Development Co., 696 A.2d 899 (Pa. Cmwlth. 1997), the Commonwealth Court of Pennsylvania[1] had held that preliminary objections are a proper responsive pleading which may be attached to a timely petition for relief from default judgment.

Notwithstanding that Pa. R.C.P. 237.3(b) virtually mandated that the court provide relief from a default judgment for a petition filed within ten days after entry thereof, and the Commonwealth Court's holding in Peters Township, *supra*, the trial court denied Losier's petition. The court also denied two motions for reconsideration of the court's denial of the petition.

On June 3-4, 2002, a non-jury trial took place, limited to the issue of the amount of Kalatschinow's

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[1] Pennsylvania's Commonwealth Court is an intermediate appellate court equivalent to the Pennsylvania Superior Court in cases where the Commonwealth of Pennsylvania, or an agency or subdivision thereof is a party.

damages. Under 42 Pa.C.S.A. section 8353, a successful plaintiff is entitled to compensatory damages for economic losses from dispossession or interference with the advantageous use of his property, harm to his reputation, attorney's fees and other expenses reasonably incurred in defending himself in the underlying matter, specific pecuniary losses resulting from the proceedings, emotional distress, and punitive damages according to law in appropriate cases.

Under 42 Pa.C.S.A. section 8354, the plaintiff (Kalatschinow) bears the burden of proving damages provided under section 8353 (A-6). However, at trial to determine the amount of his damages, Kalatschinow admitted that he incurred no attorney's fees and expenses, and failed to substantiate any specific pecuniary losses of his business and harm to his reputation. (A-1, at 19).

As to his claim of emotional distress, Kalatschinow testified that when Bombaci filed the suit against him he was "scared" and "nervous", however, he further testified that he thought the underlying action had been a "joke" and that "the whole situation was unbelievable" (A-1, at 19). This evidence was insufficient as a matter of law to establish that Kalatschinow suffered from emotional distress as that term has been defined and interpreted by the Pennsylvania Supreme Court. In Kazatsky v. King David Memorial Park, 515 Pa. 183 (1987), Pennsylvania's highest court had held that recovery of damages for emotional distress should be limited to cases of

> "serious mental distress to situations where a reasonable person normally constituted would be unable to adequately cope with the mental distress engendered by the circumstances of the event."

515 Pa. at 193.

Notwithstanding the total lack of evidence supporting Kalatschinow's claims that Pierre's conduct of the underlying action had caused him to suffer pecuniary losses, harm to his reputation, and emotional distress as that term has been defined by Pennsylvania's highest court, the trial court awarded both compensatory and punitive damages for Kalatschinow and against Pierre, Losier, and Bombaci for harm to his reputation and emotional distress.

With respect to Losier, the trial court awarded compensatory damages in the amount of $ 10,000.00, punitive damages in the amount of $17,000.00 on the basis of Losier's vicarious liability for the actions of associate attorney Pierre, and a separate punitive damage award against Losier in the amount of $10,000.00. The combined punitive damages award of $27,000.00 alone represented almost one third of Losier's average yearly net income of $103,970.00, and is almost six times the amount in fines and penalties that could have been imposed against Losier had he been charged and adjudicated guilty under comparable criminal statutes.[2]

In imposing punitive damages against Losier, the trial court specifically held that "compensatory damages need not be awarded in order to award punitive damages, nor must they be proportionate to compensatory damages." (A-1, at 21).

Losier timely filed for post-trial relief, however the lower court denied post-verdict motions on September

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[2] The criminal offense that is most analogous to attorney Pierre's actions, filing a false statement or claim with an insurance company (18 Pa. C.S.A. § 4117) carries a maximum fine of $ 5,000.00 for a first offense.

12, 2002. On September 26, 2002, Losier appealed the trial court's judgment to the Pennsylvania Superior Court.

While Losier's appeal was pending in the Pennsylvania Superior Court, on April 7, 2003, this Court rendered its decision in State Farm Mutual Automobile Insurance Company v. Campbell, et.al., 538 U.S. 408, 123 S. Ct. 1513; 155 L. Ed. 2d 585 (2003).

In his brief submitted to the Pennsylvania Superior Court, Losier asserted that the trial court had denied him due process and equal protection of the laws of the Commonwealth on the following grounds:

(1) the trial court denied Losier's right to relief from default judgment under Pa. R.C.P. 237 by retroactively applying a rule of law that was not in effect at the time Losier filed his petition for relief, and thus Losier was deprived of equal protection of the laws in effect at the time he filed his petition (A-2, at 13-15);

(2) by establishing a lower burden of proof for plaintiffs claiming emotional distress in civil cases under the Dragonetti Act than that for plaintiffs claiming emotional distress in other civil cases, Losier was denied due process and equal protection of the laws (A-2, at 20-26); and

(3) the trial court's punitive damages award was excessive and arbitrary, in violation of Fourteenth Amendment to the United States Constitution and not in accordance with the criteria set forth in this Court's decisions in and did not comport with the

> minimum due process in light of this Court's decisions in Campbell, and BMW of North America Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L .Ed. 2d 809 (1996) (A-2, at 33-37).

On May 18, 2004, the Pennsylvania Superior Court affirmed the judgment of the trial court, specifically relying upon and adopting in its entirety, the reasoning of the trial court's opinion. (PA Super. Ct. Opinion, A-3) . In so doing, the Pennsylvania Superior Court never considered, addressed, or discussed this Court's decisions in Gore and Campbell, or their application and effect upon the trial court's award of punitive damages against Losier.

Losier then timely petitioned the Pennsylvania Supreme Court for allowance of appeal (A-4). On October 28, 2004, the Pennsylvania Supreme Court denied Losier's petition (A-5). Losier timely filed a petition for reconsideration, on November 12, 2004 (A-6).

On December 15, 2004, the Pennsylvania Supreme Court denied Losier's petition for reconsideration without opinion, thereby affirming the Pennsylvania Superior Court's judgment. (A-7)

In State Farm Mutual Automobile Insurance Company v. Campbell, *supra*, this Court stated:

> The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor [citing Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S.

424,433 (2001), and BMW of North America Inc., v. Gore, 517 U.S. 559, 562, 587 (1996)]…. The reason is that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."*Id.*, at 574; *Cooper Industries, supra,* at 433 (quotations omitted)…. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim [citing Pacific Mut. Life Ins. Co. v. Haislip, 499 U.S. 1, 59(1991)]. Our concerns are heightened when the decisionmaker is presented…with evidence that has little bearing as to the amount of punitive damages that should be awarded.

….

In light of these concerns, in *Gore, supra,* we instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id.*, at 575. We

> reiterated the importance of these guideposts in *Cooper Industries* and mandated appellate courts to conduct de novo review of a trial court's application of them to the jury's award. 532 U.S. at 424. Exacting appellate review ensures that an award of punitive damages is based upon an "application of law, rather than a decision maker's caprice." *Id.*, at 436 (quoting *Gore*, *supra* at 587 (Breyer, J., concurring)).

This Court further stated that under the principles set forth in Gore, that

> "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore, supra*, at 575. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortuous conduct evinced as indifference to or reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery or deceit, or mere accident. 517 U.S., at 576-577. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of them

> all renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. *Id.*, at 575.

Campbell, 538 U.S. at _____.

In contravention of this Court's directives in Gore and Campbell, the Pennsylvania Superior and Supreme Courts never conducted a *de novo* review of the Philadelphia trial court's award of punitive damages against Losier. Nor did the Pennsylvania appellate courts apply the criteria for determining punitive damages set forth in Gore and Campbell. Had they done so, upon a thorough review of the trial court's opinion, it would have been readily apparent that, in light of the scant evidence Kalatschinow presented in support of his claim that Pierre's and Losier's conduct in the underlying action had caused him emotional distress and harmed his reputation[3], Kalatschinow was more than made whole by the award of $10,000.00 in compensatory damages, and that he had had failed to prove that either petitioner

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[3] Kalatschinow testified that as a result of the suit being filed against him, he felt "scared" and "nervous", but also that he thought Bombaci's suit was " a joke" , in that, "the whole situation was unbelievable." A-1, at 5-6. Although he also testified that after the lawsuit two of his patrons stopped coming to the restaurant, the trial court acknowledged that Kalatschinow presented no evidence to explain why they stopped patronizing his establishment. A-1, at 4, 19.

Picard Losier, the principal of Picard Losier & Associates, or his associate attorney Alex H. Pierre, had engaged in the kind of reprehensible conduct in the underlying action which would warrant the imposition of punitive damages .

Kalatschinow did not substantiate any physical injuries or economic losses. A-1 at 19. Although it was alleged that he had assaulted Bombaci, Kalatschinow was not the "target" of the underlying action. Additionally, while Bombaci in initiating suit may have evinced a malicious intent toward Kalatschinow, as to attorneys Pierre and Losier, the conduct that the trial court found to be so offensive, consisted of a single arguably wrongful act- attorney Pierre's preparation of answers to interrogatories regarding Bombaci's injuries and medical treatment, before he had obtained any medical verification from Bombaci's physician. A-1, at 3, 16. All other services that Pierre performed – preparing and filing Bombaci's complaint, representing Bombaci before the Board of Arbitrators, preparing Bombaci's legal papers so that he could perfect his appeal, attending the deposition of Bombaci's physician, - are all legal services that attorneys normally and routinely perform, and are expected to perform, in the course of representing a client.

It was further apparent from the record that petitioner Picard Losier, the principal and sole proprietor of Picard Losier & Associates, engaged and compensated co-defendant attorney Alex H. Pierre as an independent contractor to handle legal matters outside of the firm's regular area of practice, that Mr. Losier did not assume any responsibilities with respect to the representation of Bombaci in the underlying action, and did not supervise, manage, or direct attorney Alex H. Pierre, in the initiation and continuation of the underlying action, so as to

warrant imposition of punitive damages on the basis of vicarious liability. The record below established that the relationship between Losier and Pierre amounted to an agreement between two independent attorneys handling different types of cases, in which Losier agreed to share with Pierre, a percentage of the fees earned on the cases Pierre handled for the firm, based on his productivity and performance. A-1, at 23.

REASONS FOR GRANTING THE WRIT

In affirming the award of $ 27,000.00 in punitive damages against petitioner Picard Losier and Associates, where either no evidence or insufficient evidence was presented at trial to justify such an award, and the award was in excess of five times the amount which could have been imposed under comparable criminal statutes, the Supreme and subordinate courts of the Commonwealth of Pennsylvania have deprived petitioner Losier of his property without due process of law, and denied him equal protection of the law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and in conflict with this Court's decisions in BMW v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed 2d 809 (1996), and State Farm Mutual Auto Insurance Company v Campbell, 538 U.S. 408, 123 S. Ct. 1513; 155 L. Ed. 2d 585 (2003).

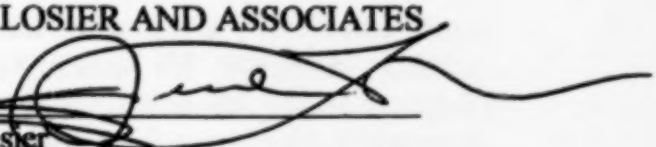
The Pennsylvania courts also denied Losier due process of law and equal protection of the laws of the Commonwealth of Pennsylvania in that the Pennsylvania courts established a lesser burden of proof for plaintiffs claiming damages for emotional distress under the Dragonetti Act, than for plaintiffs claiming emotional distress in other civil actions, thus facilitating excessive

The Pennsylvania courts further denied Losier due process of law and equal protection of the laws of the Commonwealth of Pennsylvania in that the Pennsylvania courts denied Losier the right to file a responsive pleading to Kalatschinow's complaint in the form of preliminary objections, by retroactively applying a comment to a procedural rule that was not in effect at the time Losier filed his responsive pleading, and which comment had been overruled by the Pennsylvania Superior Court. The Pennsylvania courts have refused to follow their own rules and decisional precedents, and thus they have denied Losier due process and equal protection of the laws in violation of Losier's rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Wherefore, Petitioner Picard Losier and Associates request that this Honorable Court grant the writ, and after submission of briefs and hearing of oral arguments on the issues raised herein, reverse the decision of the Pennsylvania Supreme Court affirming the judgment of the Pennsylvania Superior Court and the Philadelphia Common Pleas Court, and remand this matter for a decision in accordance with the minimum standards of due process and equal protection established under Fifth and Fourteenth Amendments of the United States Constitution as interpreted and construed by this Honorable Court.

Respectfully submitted,

PICARD LOSIER AND ASSOCIATES
By:



Picard Losier
Petitioner

(3)

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To
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APPENDIX

Picard Losier and Associates
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A-1

OPINION OF THE COURT OF COMMON PLEAS, FIRST JUDICIAL DISTRICT OF PENNSYLVANIA (PHILADELPHIA COUNTY)

GOGOL B. KALATSCHINOW
Plaintiff

V.

ALEX H. PIERRE, ESQUIRE
PICARD LOSIER & ASSOCIATES
AND ANTHONY BOMBACI
Defendants

No. 0917, June Term, 2000

(ORIGINAL PAGE NUMBERS OF OPINION APPEAR IN BRACKETS [ ])

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL SECTION

GOGOL B. KALATSCHINOW	:	**JUNE TERM,**
	:	**2000**
VS.	:	**NO. 0917**
	:	
ANTHONY BOMBACI AND	:	**SUPERIOR**
ALEX H. PIERRE AND	:	**COURT**
PICARD LOSIER & ASSOCIATES	:	**2993 EDA 2002**
	:	**3114 EDA 2002**
	:	**3649 EDA 2002**

OPINION

March 23, 2003

Joseph, J.

I. HISTORY

1. This matter involves an appeal of a finding for Plaintiff, Gogol B. Kalatschinow, on claims for wrongful use of civil proceedings and abuse of process under 42 Pa.C.S.A. § 8351, also known as the Dragonetti Act.[1]

2. On or about April 15, 1998, suit was brought against Sassafras International Café by Defendant, Alex H. Pierre, Esquire, a member of the law firm of Defendant, Picard Losier & Associates, on behalf of Anthony Bombaci. The suit alleged that on October 8, 1996 Gogol B. "Bobby" Kalatschinow, the sole owner and proprietor of Sassafras, assaulted Mr. Bombaci, an employee of Sassafras, while off-duty after Mr. Bombaci refused to discuss a work-related matter with him. The Complaint additionally averred resulting lumbosacral, cervical and [2] right shoulder sprain and strain.

Throughout the course of pre-trial discovery it was asserted that Mr. Bombaci treated with Dr. Yves Jerome for approximately six (6) months and suffered from lumbosacral sprain and strain as a result of the alleged occurrence with Mr.

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[1] Both of these torts are now subsumed under the Dragonetti Act. U.S. Express Lines, Ltd et., al., 281 F.3d 383,394 (3rd Cir. 2002).

Kalatschinow. It was also asserted that Mr. Bombaci had incurred medical expenses in the amount of six thousand five hundred dollars ($6,500.00). Despite the advisement to counsel for Sassafras that medical records were forthcoming and would be provided, they never were.

3. Mr. Bombaci testified at deposition in the inderlying matter that on the evening in question he had a problem with his assistant in the kitchen. He mentioned something to Mr. Kalatschinow and then continued with his business. When he got off work he stayed at the bar. Mr. Kalatschinow then came over and wanted to discuss the incident with him. However, Mr. Bombaci did not want to discuss the matter at that time. As Mr. Kalatschinow began getting louder, Mr. Bombaci went to leave. As Mr. Bombaci was walking out the door he felt something hit his back. He was not sure if it was the door or what it was. He testified that he was told by Matt Curci and Alicia Heck, who were both present, that Mr. Kalatschinow kicked him in the back.[2]

At deposition Mr. Bombaci further testified that the day after the incident he called a physical therapy/rehabilitation center in Center City Philadelphia as the middle of his back hurt. They referred him to Dr. Yves Jerome.[3] He allegedly treated with with Dr. Jerome for approximately six (6) months.

[3]

4. Following an arbitration hearing at which Sassafras prevailed, Mr. Bombaci, still represented by Alex Pierre, filed an appeal. At the arbitration Mr. Pierre presented no medical evidence on Mr. Bombaci's behalf. An affidavit in the name of Matt Curci, Mr. Bombaci's roommate, was presented at arbitration to substantiate Mr. Bombaci's claim. However, Matt Curci did not appear. Further, two (2) customers, Debbie Hagedorny and Alicia Heck, who were present at the time of the alleged incident between Mr. Bombaci and Mr. Kalatschinow, testified that there was no

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[2] Mr. Kalatschinow testified that he never assaulted Mr. Bombaci, or any other employee for that matter. On the evening in question he indicated that he fired Mr. Bombaci after he would not answer questions regarding a dispute he, Mr. Bombaci, had with a dishwasher.

[3] This is contradicted by Mr. Pierre who states that he referred Mr. Bombaci to Dr. Jerome.

assault.[4] Mr. Pierre indicated that *he* did not file the appeal from the arbitration award. However, he stated that he prepared the appeal and provided it to Mr. Bombaci to file if he had sufficient funds to do so. Mr. Pierre indicated that in his opinion at that point, since Mr. Curci did not appear at the arbitration, the matter boiled down to a credibility call between the two (2) parties.

5. Subsequently, the deposition of Dr. Jerome was taken.[5] Dr. Jerome testified that when he received a subpoena in October 1998, he searched his records, including list of patients, and determined that none existed for Mr. Bombaci and that he did not treat Mr. Bombaci. Although clear that Mr. Pierre represented Dr. Jerome at the time of the deposition, there was some confusion as to whether Mr. Pierre represented Dr. Jerome at the time of the receipt of the subpoena as Mr. Pierre testified inconsistently in this regard.

6. After over one (1) year of litigation, and almost three years since the alleged [4] incident in question, on August 4, 1999 a praecipe to withdraw the appeal from the arbitrator's award was filed by agreement and on September 2, 1999 a discontinuance was ordered.

7. On June 6, 2000 Mr. Kalatschinow then filed the instant matter. Interestingly, despite what had occurred in the underlying matter and despite the fact that Mr. Pierre testified that Mr. Bombaci's credibility was shot beyond repair and that he would no longer represent him, the law firm of Picard Losier & Associates entered an appearance on behalf of Mr. Bombaci in the instant matter.

8. Among other things, Mr. Kalatschinow alleges the following in his Complaint: the fact that Alex Pierre, Picard Losier & Associates, and Anthony Bombaci acted in a grossly negligent

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[4] Of note, it is Alecia Heck whom Mr. Bombaci testified told him Mr. Kalatschinow struck him in the back. Moreover, it is these two (2) customers that came in three (3) to four (4) times per week that Mr. Kalatschinow indicated no longer frequented his business.

[5] It should be noted that the deposition of Dr. Jerome occurred after the granting of a motion to compel. Moreover, Mr. Pierre, who represented Dr. Jerome at this proceeding, was friendly with Dr. Jerome, having known Dr. Jerome for approximately six (6) to seven (7) years. Mr. Pierre has been to Dr. Jerome's office and home on a few occasions and had lunch with him on at least one (1) occasion. Additionally, both men have referred clients to each other.

manner and without probable cause by initiating and/or continuing the underlying lawsuit even though they knew or should have known there was no legitimate cause of action; initiating and/or continuing the suit based on the false statements of Anthony Bombaci or Alex Pierre; alleging that Anthony Bombaci was assaulted by Gogol Kalatschinow and suffered injuries for which he treated with Dr. Yves Jerome and incurred medical expenses when they knew or should have known this was untrue; knowingly filing and verifying pleadings, discovery and other documents containing false statements; initiating and/or continuing the underlying suit for the purpose of harassing, inconveniencing, embarrassing, retaliating and securing money from Gogol Kalatschinow; abusing the legal process without justification for illegal, improper and perverted purposes; using the legal process for purposes for which the process was not intended or designated; and abusing the legal process to coerce a desired result and for improper actions rather than for some use for which process is not proper. In raising such claims, Mr. Kalatschinow asserted that Alex Pierre was an employee and/or partner of Picard Losier & Associates and that any acts and/or omissions on his part were in the course and scope of his employment with Picard Losier & Associates. [5]

9. On August 14, 2000 default judgments were obtained against Alex Pierre and Picard Losier & Associates. Although no answer or responsive pleading was ever filed on behalf of Anthony Bombaci, no default judgment was ever sought or entered against him.

10. On September 28, 2000, Defendants, Alex Pierre and Picard Losier & Associates' petition to open default was denied without prejudice by the Honorable Nitza I. Quinones Alejandro. Reconsideration was denied on November 8, 2000. A second petition to open default was denied with prejudice on June 22, 2001 by the Honorable Arthur S. Kafrissen.

11. On June 28, 2001 the matter was transferred to arbitration.

12. On July 12, 2001 Defendants' motion for summary judgment was dismissed by the Honorable Patricia A. McInerney. With respect to Alex Pierre and Picard Losier & Associates the motion was dismissed as moot due to the unopened default judgments. With respect to Anthony Bombaci the motion

was dismissed as premature as the relevant pleadings were not closed.

13. On September 17, 2001 an arbitration hearing took place. The panel of arbitrators awarded Plaintiff, Gogol Kalatschinow, twenty-five thousand dollars ($ 25,000.00). Defendants subsequently appealed on October 15, 2001.

14. Due to failure to provide responses to discovery requests, the Honorable Matthew D. Carrafiello entered an order dated March 6, 2002 precluding Defendants from opposing or introducing any evidence or testimony at trial or from cross-examining any witnesses.[6] No motion for reconsideration was filed.

15. A non-jury trial took place on June 3 and 4, 2002.

16. Mr. Kalatschinow testified that as a result of suit being filed against him he was [6] scared and nervous, especially due to the fact that after he reported the matter to his insurance company he received a reservation of rights letter which meant, and he understood to mean, that he could personally be responsible. While he did mention that he thought it was a joke, he explained that he did not mean a funny joke, but rather a joke as in that the whole situation was unbelievable.

17. Mr. Kalatschinow further stated that as a result of Mr. Bombaci's lawsuit there was a negative atmosphere about his business and that he lost business in the amount of ten percent (10%). However, there was no testimony as to the amount of his total business. Moreover, while he stated that two (2) regular customers, Debbie Hagedorny and Alicia Heck, no longer came to his establishment, they both testified on his behalf at the arbitration hearing in the underlying matter.

18. Mr. Pierre testified that, despite his referral, he did not know that Mr. Bombaci had not treated with Dr. Jerome. He stated that, although there was no indication in the file, he requested Mr. Bombaci's records from Dr. Jerome's office. However, in his experience, Dr. Jerome's office was very hard to deal with in this regard.

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[6] Four (4) previous discovery orders had been entered due to the failure to provide the same discovery requests, the last two (2) of which imposed monetary sanctions. Moreover, an order of July 13, 2001 warned that this would be a potential future sanction.

19. Mr. Pierre further testified that, although he was without supporting records, he prepared the answers to interrogatories, which included the diagnosis of lumbosacral sprain and strain and medical expenses in the amount of six thousand five hundred dollars ($ 6,500.00). He indicated that these answers were based on his experience as a personal injury attorney. Later, he stated that Mr. Bombaci provided the answers and he just typed them.

20. On the issue of punitive damages, testimony was presented that Picard Losier & Associates' earnings were as follows:

1996	$455,174.00 gross	$175,616.00 net
1997	$329,147.00 gross	$95,312.00 net
1998	$399,361.00 gross	$98,079.00 net
1999	$315,000.00 gross [7]	$102,652.00 net
2000	$256,000.00 gross	$48,191.00 net

21. Further, testimony was presented that Mr. Pierre's earnings were as follows:

1996	$51,422.00
1997	$77,900.00
2000	$61,739.25

22. On August 22, 2002, this court entered a finding in favor of Plaintiff, Gogol Kalatschinow, in the amount of ten thousand ($10,000.00) compensatory damages; punitive damages against Defendant Alex Pierre, in the amount of ten thousand dollars ($10,000.00; punitive damages against Defendant Picard Losier & Associates, in the amount of seven thousand dollars ($7,000.00); and punitive damages against Defendant, Anthony Bombaci, in the amount of five thousand dollars ($5,000.00).

23. All parties, except Defendant, Anthony Bombaci, filed post-trial motions. Plaintiff, Gogol Kalatschinow moved for post-trial relief asserting that Defendant, Picard Losier & Associates, is vicariously liable for the punitive damage finding against Defendant, Alex Pierre, as well as for the finding specifically against them.

Defendant, Picard Losier & Associates, moved for judgment notwithstanding the verdict asserting: the evidence was insufficient to prove either compensatory or punitive damages; the evidence was insufficient to prove that Picard Losier & Associates was vicariously liable; the evidence was insufficient to prove wrongful use of civil proceedings and abuse of process; and the verdict was against the weight of the evidence. Said defendant additionally moved for new trial asserting: error in denying petitions to open default; error in precluding defendants from presenting evidence in their defense and allowing them to cross-examine witnesses; error in awarding compensatory damages; error in awarding compensatory damages as they were against the weight of the evidence; error in awarding punitive damages against Picard Losier & Associates; and error in finding for Plaintiff against the weight of the evidence. In the [8] alternative, said defendant moved for remittitur. Defendant Alex Pierre, moved for judgment notwithstanding the verdict asserting: error and/or abuse of discretion in denial of the petitions to open default; error and/or abuse of discretion in denial of the motion for summary judgment; error and/or abuse of discretion in not apportioning liability; error and/or abuse of discretion in finding compensatory damages; error and/or abuse of discretion in imposing punitive damages for conduct which is no longer outrageous; error and/or abuse of discretion for imposition of damages where Plaintiff had committed a wrong worse than the gravamen of the Complaint.

Said motions were denied by this court on September 11, 2002. No motion for reconsideration was filed by any of the parties.

24. On September 26, 2002 Defendant Picard Losier & Associates, filed a Notice of Appeal.

25. On October 11, 2002 Defendant, Alex Pierre, filed a Notice of Appeal.

26. On October 21, 2002 this court entered an order requiring Alex Pierre and Picard Losier & Associates file a Statement of Matters Complained of on Appeal pursuant to Pennsylvania Rule of Civil Procedure 1925(b). Pursuant to this order, said defendants filed same on October 30, 2002 as well as a praecipe to enter judgment.

Defendant, Alex Pierre, asserts the following issues on appeal: error and/or abuse of discretion in denial of petitions to

open default; error and/or abuse of discretion in denial of summary judgment; error and/or abuse of discretion in finding compensatory damages; error and/or abuse of discretion in imposing punitive damages where there was no basis for compensatory damages; abuse of discretion in assessing damages for behavior which is no longer outrageous; error and /or abuse of [9] process in imposing damages where Plaintiff had not committed a wrong worse than the gravamen of the Complaint.

Defendant Picard Losier & Associates, asserts the following issues on appeal: the evidence was insufficient to prove damages; the evidence was insufficient to prove vicarious liability; the verdict against weight of evidence; error and/or abuse of discretion in denying petition to open default; error in precluding defendants from presenting evidence in their defense or cross-examine witnesses; error in awarding punitive damages; error as compensatory damages were against the weight of the evidence; error in awarding punitive damages against Picard Losier & Associates; error in finding for Plaintiff against weight of the evidence; error and/or abuse of discretion in denying remittitur; error in denying request for court en banc; error in denying post-trial motions.

27. On November 25, 2002, Plaintiff, Gogol Kalatschinow, filed a cross-appeal.

28. On December 17, 2002, pursuant to this court's order, Plaintiff filed a Statement of Matters Complained of on Appeal asserting that Defendant, Picard Losier & Associates, should be vicariously liable for the punitive damage award against Defendant, Alex Pierre.

II. DISCUSSION

A. Default Judgments

Pennsylvania Rule of Civil Procedure 237.3 states:

> (a) A petition for relief from a judgment of non pros or of a default entered pursuant to Rule 237.1 shall have attached hereto a verified copy of the complaint or answer the petitioner seeks leave to file.

(b) If the petition is filed within ten (10) days after entry of [10] judgment on the docket, the court shall open the judgment if the proposed complaint or answer states a meritorious cause of action or defense.

This rule further states that "[a] defendant who seeks to file a pleading other than an answer is not entitled to the benefit of this rule but must comply with the requirements of Schultz v. Erie Insurance Exchange...." Additionally, the Explanatory Comment notes via illustration that a defendant who files a timely petition to vacate default but seeks leave to file preliminary objections " is not entitled to the benefit of Rule 237.3(b), although the petition is timely filed, the rule does not provide for preliminary objections to be attached to the petition."

While the court in Peters Township Sanitary Authority v. American Home and Land Development Co., ____ Pa. Cmwlth. _____, 696 A.2d 899 (1997), held that a motion to vacate a judgment of default should have been granted where filed within ten (10) days and preliminary objections were submitted, the preliminary objections were not attached to the motion to vacate as a potential pleading. Instead, they were filed the same day the petition to enter default judgment was filed.

Accordingly, as the preliminary objections in this matter were attached to the petition to vacate in an attempt for leave to file said pleading should the petition be granted, the denial of petitions to vacate default was proper.

B.Summary Judgment

Pennsylvania Rule of Civil Procedure 1035.2 states:

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

(1) Whenever there is no genuine issue of material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or [11]

(2) if, after the completion of discovery relevant to the motion, including the production of expert

> reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial require the issues to be submitted to a jury.

In the case at bar, default judgments were entered against Defendants, Alex Pierre and Picard Losier & Associates. These default judgments were not opened. Accordingly, summary judgment would not be proper as to these defendants.

Further, while there was not a default judgment entered against Defendant, Anthony Bombaci, the matter was transferred to arbitration on June 28, 2001 with a new case management schedule not set until November 27, 2001. Moreover, there were outstanding discovery requests as evidenced by the numerous discovery orders in this matter commencing on January 25, 2001. Therefore summary judgment was premature with regard to Mr. Bombaci as the relevant proceedings were not closed.[7]

Moreover, and more importantly, it does not appear that it was even appropriate for Defendants to challenge the denial of summary judgment via post-trial motion.

> The note to Pa.R.C.P. 227.1(c) states that a motion for post-trial relief may be filed following a trial by jury, a trial by a judge without a jury in an action at law pursuant to Rule 1038 or a trial by a judge without a jury in an action in equity. Logically, post-trial motions may not be filed to orders disposing of pre-trial motions (i.e., orders disposing of preliminary objections, **motions for summary judgment**, motions relating to discovery) or motions relating to proceedings not constituting a trial.

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[7] Notwithstanding, it is difficult to imagine a situation in which it would have been appropriate to grant summary judgment in favor of Defendant, Anthony Bombaci. As no answer or responsive pleading was ever filed on his behalf, the allegations against him are deemed as true, Pennsylvania Rule of Civil Procedure 1029, and he is in violation of the statute.

(emphasis added). Bostick, et al. v. Schall's Brakes and Repairs, Inc., _____ Pa. Super. _____, 725 A.2d 1232, 1235 (1999).

[12]

A. Discovery Sanctions

"The decision to sanction a party for a discovery violation and the severity of that sanction are matters vested in the sound discretion of the trial court." Smith v. Philadelphia Gas Works, ___ Pa. Cmwlth. _____, 740 A.2d 1200,1202 (1999). Further, the court noted that "under Pa.R.C.P. No. 4019(a)(1)(vii), a trial court may 'make an appropriate order' if a party 'fails to make discovery or to obey an order of court respecting discovery.' Similarly, Pa.R.C.P. 4019(c)(2) specifically authorizes trial courts to enter order prohibiting the disobedient party from introducing evidence at trial." Id. This is the same sanction entered in this matter.

Moreover,

> Pennsylvania courts have long recognized that under the coordinate jurisdiction rule, judges of coordinate jurisdiction sitting in the same case should not overrule each other's decisions. (citation omitted). The coordinate jurisdiction rule is premised on the sound jurisprudential policy of fostering finality in pre-trial proceedings, thereby promoting judicial economy and efficiency. (citation omitted). This rule prevents forum shopping because without this rule, the same issue could be raised repeatedly before different judges of the same court until a litigant finds a judge sympathetic to his or her position. (citation omitted). An exception to this rule is when there is new evidence or newly decided legal authorities compelling the second judge to overrule the first judge's decision.(citation omitted).

Baysmore v. Brownstein, _____ Pa. Super. _____, 771 A.2d 54,58 (2001). See also Riccio v. American Republic Ins. Co. ,550 Pa. 254, 260-261, 705 A.2d 422,425 (1997); Commonwealth

v. Starr, 541 Pa. 564, 573-574, 664 A.2d 1326,1331 (1995); National Railroad Passenger Corp. v. Fowler, et. al., _____ Pa. Cmwlth. _____, 788 A.2d 1053, 1060 (2001).

However, this does not preclude a succeeding judge from overruling a prior order where the motions differ in kind, nor does it prevent a succeeding judge from doing so when presented in the context of a motion for post-trial relief. Riccio, 550 Pa. at 261-262, 705 A.2d at 425.

In this matter, by order of Judge Carafiello dated March 6, 2002 Defendants were [13] precluded from opposing or introducing any evidence or testimony at trial or from cross-examining any witnesses. At the time of trial, this court was therefore bound to enforce the order of Judge Carafiello. Nevertheless, given that there were a total of four (4) prior orders compelling discovery responses, two (2) of which awarded monetary sanctions, and one (1) of which warned of this sanction, this court does not disagree with this order. Aditionally, no request for reconsideration was made after the order was entered by Judge Carafiello and one was not made until almost the end of trial.

B. Liability

Pursuant to 42 Pa. C.S. A. § 8351(a):

> A person who takes part in the procurement, initiation, or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings [if]:
>
> (1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and
>
> (2) The proceedings have terminated in favor of the person against whom they are brought.

Further, as provided in 42 Pa.C.S.A. § 8352, such a person has probable cause if he has a reasonable belief in the facts substantiating his claim, and

(1) reasonably believes that under those facts the claim may be valid under existing or developing law;

(2) Believes to this effect in reliance upon the advise of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information; or

(3) Believes as an attorney of record, in good faith that his procurement, initiation or continuation of a civil cause is not intended merely to harass or maliciously injure that opposite party.

Conversely,

[14]

Gross negligence is defined... as a lack of slight diligence or care, or a conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages.[citation omitted]. Gross negligence has also been described as the "want of even scant care" and 'the failure to exercise even that care which a careless person would use." [citations omitted].

Hart v. O'Malley, et., al., _____ Pa. Super. _____, 781 A.2d 1211, 1218 (2001).

Here, given that default judgments were entered against Defendants, Alex Pierre and Picard Losier & Associates, said defendants are in violation of this statute. Further, as no answer or responsive pleading was ever filed on behalf of Defendant, Anthony Bombaci, the allegations against him are deemed true, Pennsylvania Rule of Civil Procedure 1029, and he is in violation of 42 Pa.C.S.A. § 8351, et.seq., also known as the Dragonetti Act.[8]

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[8] The tort of 'abuse of process' is defined as the use of legal process against another 'primarily to accomplish a purpose for which it is not designed.' (citations omitted). To establish a claim for abuse of process it must be shown that the defendant (1) used a

Notwithstanding, based on the evidence presented to this court, Defendants would be in violation of the Dragonetti Act. Mr. Bombaci pursued this matter indicating injury as a result of an altercation with Mr. Kalatschinow and treatment for said injury with Dr. Jerome. While an affidavit in the name of Matt Curci, Mr. Bombaci's roommate, was presented to support the underlying claim, Mr. Curci never appeared to testify. And, in fact, Alicia Heck and Debbie Hagedorny testified in contravention to Mr. Bombaci's claim. Further, despite allegations of injury and treatment with Dr. Jerome, Dr. Jerome testified at deposition that

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legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the plaintiff." Id. This tort differs from that of wrongful use of civil proceedings in that, in the former, the existence of probable cause to employ the particular process for its intended use is immaterial. See id. The gravamen of abuse of process is the perversion of the particular legal process for a purpose of benefit to the defendant, which is not an authorized goal of the procedure. Id. In support of this claim, the Shiners must show '[s]ome definite act or threat not authorized by the process...; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even with bad intentions.'(citations omitted). Shiner v. Moriarty, _____ Pa. Super _____, 706 A.2d 1228, 1236 (1998), app. denied, 556 Pa. 639, 523 A.2d 346 (1998). See also Shaffer v. Stewart, et., al., 326 Pa. Super. 135, 138-139, 473 A.2d 1017, 1019 (1984), Hart v. O'Malley, 436 Pa. Super. 151, 170-171, 647 A.2d 542, 552 (1994); Triester, et., al., v. 191 Tenants Ass'n. et. al., 272 Pa. Super. 271, 279, 415 A.2d 698, 703-703 (1979).

Although the torts of abuse of process and wrongful use of civil proceedings are now subsumed under the Dragonetti Act, given the default judgments, and the fact that the allegations in the pleadings are deemed as true, defendants would be liable with regard to this tort, regardless.

he did not treat Mr. Bombaci and had no records of such a patient. Nevertheless, Mr. Bombaci continued the underlying suit and even filed an appeal following an arbitration award in favor of Sassafrass.

Moreover, an attorney is not required to "prejudge" a client's claim and is entitled to "rely in good faith upon the statement of facts made to him by his client...." Meiksin v. Howard Hanna Co., Inc., et.al., 404 Pa. Super. 417, 420-421, 424, 590 A.2d 1303,1305,1306 (1991). However, if counsel acts "without probable cause for belief in the possibility that the claim will succeed, and for an improper purpose... he is subject to the same liability as any other person." Shaffer v. Stewart, et., al., 326 Pa. Super. 135, 140-141, 473 A.2d 1017, 1020 (1984). See also Gentzler, et., al. v. Atlee, et., al., 443 Pa. Super. 128, 135, 660 A.2d 1378, 1382 (fn. 6)(1995); Meiksin, 404 Pa. Super. 417,420-421, 590 A.2d 1303,1305 (1991). Specifically, in Meiksin the court found that counsel who relied upon statements of an employee of the client in bringing the underlying suit was not liable under the Dragonetti Act as they did not act without probable cause and there was no evidence of action for an improper purpose. 404 Pa. Super at 423-425, 590 A.2d at 1306-1307. The court found that there was probable cause as there was sufficient evidence to support the statements of the employee. Supporting the finding of probable cause, the court [16] looked to the fact that counsel relied on the employee's statement, which was not disputed, and led to the trial court's granting of summary judgment. Id. At 423-424, 590 A.2d at 1306. Further, the court looked to the fact that there were motions for summary judgment and compulsory non-suit in the underlying matter that were denied suggesting a legitimate dispute of facts. Id. At 423-425, 590 A.2d at 1306-1307.

Here, Mr. Pierre not only filed a Complaint alleging personal injury without viewing any medical documentation whatsoever, but he responded to discovery without such evidence thereby fabricating a diagnosis and amount of medical expenses incurred. Further, there was no evidence presented that Mr. Pierre even requested such documentation. Additionally, at arbitration no medical evidence was presented and Matt Curci did not testify and corroborate Bombaci's story. Instead, two (2) other witnesses, Alicia Heck and Debbie Hagedorny, testified to the contrary. Following the loss at arbitration Mr. Pierre prepared an appeal and

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continued to represent Mr. Bombaci and incredibly his firm entered their appearance on his behalf in this matter. Unlike Meiksin, the statements and testimony of Mr. Bombaci which Mr. Pierre relied upon were disputed, not only by Mr. Kalataschinow, but by two (2) witnesses, Alicia Heck and Debbie Hagedorny. Further, there was no medical evidence supporting any claim of personal injury. Accordingly, there was not sufficient evidence to support Mr. Bombaci's claims. Therefore, Mr. Pierre did not have probable cause and would be liable under the Dragonetti Act. The law firm of Picard Losier & Associates would be vicariously liable for the reasons discussed later with regard to damages.

However, this court previously did not apportion liability.

> A court can direct the apportionment of liability among distinct causes only when the injured party suffers distinct harms or when the court is able to identify " a reasonable basis for determining the contribution of each cause to a single harm." ... Determining whether " a logical, reasonable or practical" basis for apportionment exists necessarily requires the court to consider the unique [17] circumstances of each case. Although most single personal injuries defy objective apportionment, citation omitted, we should not allow one party to bear an entire liability if the particular facts of the case will support a reasonable alternative. On the other hand, we cannot allow an arbitrary apportionment merely to avoid imposition of entire liability. A court should not limit the innocent plaintiff's ability to recover the full measure of damages unless the court has some reasonable basis for doing so.

Glomb v. Glomb, et., al., 366 Pa. Super. 206,212, 530 A.2d 1362, 1365 (1987).

In determining whether to apportion liability the court in Glomb noted the following factors: the identity of a cause of action against each of two or more defendants; the existence of a common, like duty; whether the same evidence will support an action against each; the single, indivisible nature of the injury to the plaintiff; whether the injury is direct and immediate, rather than consequential[;] responsibility of the defendants for the same

injuria as distinguished from damnum. Id. At 213, 530 A.2d at 1366. Nonetheless, the court also indicated that the dtermination is one that needs to be made on a case by case basis and that sometimes some of the aforementioned factors help and sometimes none of the factors help. Id. At 213-214, 530 A.2d at 1366.

In the case at bar, while this court addressed liability, as indicated, liability was not required to be determined and the matter was merely an assessment of damages given the default judgments and the failure to file an Answer or responsive pleading. Accordingly, this court does not apportion liability.

C. Damages

With respect to damages, 42 Pa. C.S.A. § 8353 states:

> When the essential elements of an action brought pursuant to this subchapter have been established as provided in section 8351 (relating to wrongful use of civil proceedings), the plaintiff is entitled to recover for the following: [18]
>
> (1) The harm normally resulting from any arrest or imprisonment , or any dispossession or interference with the advantageous use of his land, chattels, or things, suffered by him during the course of the proceedings.
>
> (2) The harm to his reputation by any defamatory matter alleged as the basis of the proceedings.
>
> (3) The expense, including any reasonable attorneys fees, that he ahs reasonably incurred in defending himself against the proceedings.
>
> (4) Any specific pecuniary loss that has resulted from the proceedings.
>
> (5) Any emotional distress that is caused by the proceedings.

(6) Punitive damages according to the law in appropriate cases.

The above can be separated into compensatory damages which are covered by subsections (1) through (5) and punitive damages which are covered by subsection (6).

Of note regarding subsection (5) is the fact that, contrary to Defendants' assertions, expert testimony is not required to be presented with regard to emotional distress. Shiner v. Moriarty, et.al., _____ Pa. Super _____, 706 A.2d 1228,1239 (1998), app. denied, 556 Pa. 639, 523 A.2d 346 (1998).

1. Compensatory Damages

In Cilo v. Shields, 33 Pa.D.&C.4th 10 (Pa.Com.Pl. 1996), Attorney Cilo filed a suit for wrongful use of civil process against Shields, the husband of one of his clients, alleging inappropriate actions on the part of Cilo. The court awarded compensatory damages, stating as follows:

> Cilo testified that he suffered anger, anxiety, and emotional upset as a result of the allegations and accusations by Shields. As an attorney, Cilo's professional reputation is not only vital to his ability earn a living and support his family, but to his emotional well-being in his day-to-day relationship [19] with his friends, fellow attorneys, and general public. Cilo testified that Shields' initial writ of summons and complaint in the prothonotary's office of Mifflin County were open to the public, members of the bar, courthouse employees, etc. and caused him embarrassment and anger, rendering it necessary from him to file the written complaint in this case against Shields, adding that the considerable time consumed in the preparation of this case detracted from his regular practice of law.

Id. At 17-18.

In this matter, no attorneys fees are being claimed as Mr. Kalatschinow's insurance company paid for the defense of the underlying matter. However, with respect to the remaining areas of compensatory damages, Mr. Kalatschinow testified that he was nervous, scared and embarrassed as a result of the lawsuit that was filed by Mr. Bombaci. Further he testified that he felt like his restaurant had a bad atmosphere about it as a result of the lawsuit. As a result, two of his regular customers, Alicia Heck and Debbie Hagedorny, no longer patronized Mr. Kalatschinow's establishment and he lost ten percent (10%) of his business. There is no explanation why Alicia and Debbie no longer patronize Mr. Kalatschinow's establishment as they testified in Mr. Kalatschinow's behalf at the arbitration hearing in the underlying matter. Likewise, Mr. Kalatschinow merely stated that business dropped ten percent (10%). He offered no testimony as to the total amount of his business. Accordingly, he is entitled to compensatory damages for damage to his reputation and his emotional distress in the amount of ten thousand dollars ($10,000.00).

2. Punitive Damages

As indicated, in subsection (6) punitive damages may be awarded if appropriate. It has long been held that as punitive damages are for the purpose of punishment they are appropriate only where the conduct is outrageous. Dean Witter Reynolds, Inc. v. Genteel, 346 Pa. Super. 336, [20] 347-348, 499 A.2d 637, 642-643 (1985). See also Kirkbride v. Lisbon Contractors, Inc., 521 Pa. 97, 555 A.2d 800 (1989); Hart v. O'Malley, _____ Pa. Super. _____, 781 A.2d 1211 (2001); Shiner v. Moriarty, _____ Pa. Super. _____, 706 A.2d 1228 (1998), app. denied, 556 Pa. 639, 523 A.2d 346 (1998).

> Punitive damages are defined by section 908(1) as damages other than compensatory or nominal, awarded against a person to punish him for outrageous conduct and deter him and others like him from similar conduct in the future. Section 908(2) provides that :
>
> Punitive damages may be awarded for conduct that is outrageous, because of the

> defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

> Thus, punitive damages are proper when the actt "imports insult or outrage, and is committed with a view to oppress or is done in contempt of plaintiffs' rights.... Punitive damages may be given when the act is done with reckless indifference, as well as, bad motive." [citations omitted]. Punitive damages must be based on conduct which is malicious, wanton, reckless, willful or oppressive. [citations omitted]. The imposition of damages to a civil defendant is appropriate only where the conduct complained of is especially egregious. [citation omitted]. We must look to the act itself, together with the circumstances, including the motive of the wrongdoers and the relations between the parties. [citation omitted]. "The state of mind of the actor is vital. The act, or the failure to act, must be intentional, reckless or malicious."[citations omitted].

Dean Witter Reynolds, Inc. 346 Pa. Super. At 347-348, 499 A.2d at 642-643.

In Hart the court held that as the defendant was found to have violated the Dragonetti Act punitive damages were warranted. _____ Pa. Super. _____, 781 A.2d at 1218. Further, in Bannar et.al. v. Miller et.al., the court held that punitive damages were warranted where an attorney filed and continued a suit knowing there were factual inaccuracies in the pleadings. _____ Pa. Super. _____, 701 A.2d 232, 242 (1997).

Moreover, while the underlying suit must be founded, compensatory damages need not be

awarded in order to award punitive damages, nor must they be proportionate to compensatory damages. Kirkbride, 521 Pa. at 101-102, 555 A.2d at 802-803.

Given that punitive damages are therefore penal "[t]he size of a punitive damages award must be reasonably related to the State's interest in punishing and deterring the particular behavior of the defendant and not the product of arbitrariness or unfettered discretion." Shiner , _____ Pa. Super. at _____, 706 A.2d at 1241.

In this matter, Plaintiff, Gogol Kalatschinow, is entitled to punitive damages from defendant , Alex Pierre. Not only is Mr. Pierre in violation of the Dragonetti Act given the default judgment, but given the allegations of the Complaint in this matter, which are deemed admitted pursuant to Pennsylvania Rule of Civil Procedure 1029 and which the default judgment is based, the behavior of Mr. Pierre was outrageous, reckless and deserving of punitive damages. Further, based on evidence presented to this court, punitive damages are warranted. As stated previoiusly, while Mr. Pierre stated he did not know that Mr. Bombaci did not go to Dr. Jerome, not only did he prepare a Complaint, he prepared discovery in the underlying matter fabricating a diagnosis and amount of medical expenses. Although he testified that he requested medical records from Dr. Jerome, no evidence was presented to suggest that he ever requested said records. The behavior is outrageous and reckless and deserving of punitive damages.

Similarly, Mr. Kalatschinow is entitled to punitive damages from Defendant, Picard Losier & Associates, given the default judgment. Further, as with Mr. Pierre, given the allegations of the Complaint, which are deemed admitted and which the default judgment is based, the behavior of Picard Losier & Associates was outrageous, reckless and deserving of punitive damages.

Likewise, Mr. Kalatschinow is entitled to punitive damages from Defendant, Anthony Bombaci. This would be based on the allegations of the Complaint which are deemed admitted [22] as no responsive pleading was ever filed. Additionally, punitive damages would be warranted from the evidence presented at trial. Despite the fact that Mr. Bombaci never went to Dr. Jerome, throughout litigation of underlying matter he maintained

the fact that he did and continued to pursue his suit in that manner. Further, despite the fact that he may have been able to maintain a suit regardless, he pursued a claim based on alleged injuries that were not diagnosed by Dr. Jerome or any medical professional.

D. Vicarious Liability

Under the law of agency, a master is a principal that is responsible for the acts of his agent, a servant, on the basis of vicarious liability due to the nature of control retained by the master. Turley v. Trotter, 263 Pa. Super. 523, 529-530, 398 A.2d 699, 702-703 (1979). See also Smallich v. Westfall, 440 Pa. 409, 413-414, 269 A.2d 476, 480-481 (1970). Accordingly, an employer may be responsible for the acts of an employee committed during the course and scope of employment on the basis of vicarious liability. Valles v. Albert Einstein Medical Center, et al., 569 Pa. 542, _, 805 A.2d 1232, 1237 (2002).

Moreover, a master and/or principal may be responsible for punitive damages on the theory of vicarious liability. Shiner v. Moriarty, et al., _____ Pa. Super. _____, 706 A.2d 1228, 1240 (1998), app. denied, 556 Pa. 639, 523 A.2d 346 (1998); Dean Witter Reynolds, Inc. v. Genteel, 346 Pa. Super. At 348-349, 499 A.2d at 643. "Punitive damages may be awarded on the basis of vicarious liability. [citation omitted]. In Pennsylvania, there is no requirement that an agent commit a tortuous act at the direction of his principal, nor must the principal ratify the act, in order for punitive damages to be imposed on him." Shiner, _____ Pa. Super. _____, 706 A.2d at 1240. More importantly, Pennsylvania has not adopted section 909 of the Restatement Second of Torts which contains a less restrictive rule of law regarding vicarious liability and limits an employer's [23] liability. Dean Witter Reynolds, Inc., 346 Pa. Super. At 348-349, 499 A.2d at 643. Nevertheless, a plaintiff must establish a vicarious relationship.

It is deemed admitted that Alex Pierre was an employee of and/or partner of Picard Losier & Associates and that any acts omissions alleged were committed or omitted in course and scope of his employment with Picard Losier & Associates. This is as no Answer or responsive pleading was ever filed and a default judgment was entered. Hence, Picard Losier & Associates are vicariously liable for punitive damages as the result of Alex Pierre's actions. Accordingly, this court's finding should be

corrected to make Picard Losier & Associates additionally responsible for the judgment of punitive damages against Alex Pierre.

Even if the testimony with regard to the employment relationship of Alex Pierre and Picard Losier & Associates were reviewed, Picard Losier & Associates would still be vicariously liable for the actions of Alex Pierre.

Mr. Pierre testified that he handles all of the personal injury matters for the firm, regardless of who generates the case. He indicated that he handles these cases as he sees fit without being micro-managed and that the firm generally pays the expenses of the case. When questioned as to his employment status at the firm Mr. Pierre stated that he is a 1099 independent contractor who receives a percentage of the income he generates for the firm. At trial he characterized this as "employment for fee." However, he additionally stated that he considers himself an associate, in fact, "the associate." Mr. Losier testified similarly, except while Mr. Pierre testified that he was never a salaried employee, Mr. Losier testified that Mr. Pierre was a salaried employee prior to being compensated based on his productivity or performance with an occasional draw. Mr. Losier indicated that this change was due to economic issues surrounding the firm.

Clearly, while Mr. Pierre manages his own case load, he is still an employee of Picard [24] Losier & Associates. Many associates at law firms, especially mid to upper level, handle their own case load and proceed as they see fit; however, they are still employees of the law firm. Likewise, although Mr. Pierre handles all of the firm's personal injury matters, this does not make him an independent contractor rather than an employee. Many firms have an attorney or attorneys who specialize in certain areas. Therefore, just because the other attorneys at Picard Losier & Associates may practice and concentrate in another area of law, the fact that Alex Pierre handles personal injury matters does not make him any less a part of Picard Losier & Associates. Further, while the firm did not pay for Mr. Pierre's insurance or provide other benefits[9], the firm would pay for the expenses of the cases handled by Mr. Pierre, which included those generated by someone in the firm other than Mr. Pierre. More importantly, Picard Losier likely may

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[9] It should be noted that Mr. Pierre did not pay for these benefits for himself either.

terminate Mr. Pierre if he sees fit. Hence, while Mr. Pierre may call himself a 1099 independent contractor, as illustrated by the testimony of Picard Losier, the arrangement with Picard Losier & Associates was an arrangement out of economic necessity. Mr. Pierre was nonetheless still an employee of Picard Losier & Associates. As his actions with regard to the underlying suit were in the course and scope of his employment with Picard Losier & Associates, the firm would therefore be vicariously liable.

G. Remittitur

In Refuse Management Systems, Inc. v. Consolidated Recycling and Transfer Systems, Inc. et a.l, 448 Pa. Super. 402, 671 A.2d 1140 (1996) the court made it clear that the trial court in a non-jury trial may not grant a remittitur. The court stated:

> A remittitur by definition is:
>
> The procedural process by which an excessive
> [25]
> verdict of the jury is reduced. If money damages awarded by a jury are grossly excessive as a matter of law, the judge may order the plaintiff to remit a portion of the award. In the alternative, the court may award a complete new trial or a trial limited to the issue of damages. The court may also condition a denial of a motion for a new trial upon the filing by the plaintiff of a remittitur in a stated amount. (citation omitted)(emphasis omitted). It is readlily apparent, therefore, that a motion for a remittitur should only be made, and can only be granted, when there is a jury trial and a verdict.
>
> ....
>
> In the instant case, we have a non-jury trial. Accordingly, LCA's motion for remittitur was improvidently made and granted. It would defy logic to hold otherwise. We would be hard pressed indeed to find that a court could so shock its own conscience in granting an award. Rather,

the appropriate procedure in a non-jury action is to move for a modification of the verdict.

This matter was a non-jury trial. Consequently, a party could not move for and this court cannot grant remittitur.

H. Court en banc

Pursuant to Pennsylvania Rule of Civil Procedure 227.2:

> All post-trial motions and other post-trial matters shall be heard and decided by the trial judge unless the trial judge orders that the matter be heard by a court en banc of which the trial judge shall be a member. If the trial judge for any reason cannot hear the matter, another judge shall be designated to act. No more than three judges shall constitute the court en banc.

While a party may request a court *en banc*, the Explanatory Comment to this rule states that "it is in the discretion of the trial judge to grant the request."

Accordingly, as there is nothing unique or novel with regard to the legal issues raised by the parties in this matter, this court did not abuse its discretion in denying the request [26] for a court *en banc* with respect to the post-trial motions.

III. CONCLUSION

For the foregoing reasons, the post-trial motions were denied.

BY THE COURT:

/s/ Barbara A. Joseph
J.

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PURSUANT TO Pa.R.C.P. 236(b)
MAR 25 2003
First Judicial District of Pa.
User I.D.: /s/ mas

BRIEF FOR APPELLANT PICARD LOSIER AND ASSOCIATES FILED IN THE PENNSYLVANIA SUPERIOR COURT

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 2993 EDA 2002
NO. 3114 EDA 2002
NO. 3649 EDA 2002

GOGOL B. KALATSCHINOW
Appelle/Cross Appellant
v.
ALEX H. PIERRE, ESQUIRE
Appellant/Cross Appellee

PICARD LOSIER & ASSOCIATES
Appellant/Cross-Appellee
And
ANTHONY BOMBACI
Cross-Appellee

BRIEF FOR APPELLANT PICARD LOSIER & ASSOCIATES

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(ORIGINAL PAGE NUMBERS OF BRIEF IN BRACKETS [ ] WITHIN AND ABOVE TEXT)

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I. STATEMENT OF JURISDICTION

This is an appeal from the final order of the Philadelphia County Court of common Pleas, Civil Division. This Court has jurisdiction over this matter pursuant to 42 Pa.C.S.A. section 742 and Pennsylvania Rule of Appellate Procedure 341.

II. STANDARD AND SCOPE OF REVIEW

The issues raised on appeal by Losier Picard Losier & Associates involve questions of law. Therefore, this Court's review is plenary . Flanagan v. Fidelity Bank, 652 A.2d 930,932 (Pa. Super. 1995). The scope of review on the issues raised should address whether the trial court abused its discretion, committed errors of the law, and denied Losier due process and equal protection of the laws under the Pennsylvania and United States Constitutions.

III. ORDER IN QUESTION

Appellant Picard Losier & Associates ('Losier') appeals from the Order of September 11, 2002, denying his Motion for post-trial relief.

AND NOW, this 11th day of September, 2002, it is hereby ORDERED AND DECREED that Defendant, Pierre's, post trial motion for judgment notwithstanding the verdict and verdict, a new trial, or in the alternative, remittitur are DENIED.

BY THE COURT:

/S/ Barbara Joseph
J.

IV. STATEMENT OF QUESTIONS INVOLVED

A. DID THE LOWER COURT ERR AS A MATTER OF LAW AND ABUSE ITS DISCRETION IN DENYING LOSIER'S PETITIONS FOR RELIEF FROM DEFAULT JUDGMENT?

B. DID THE LOWER COURT ABUSE ITS DISCRETION, AND DENY LOSIER DUE PROCESS WHEN IT REFUSED TO PERMIT LOSIER TO INTRODUCE ANY EVIDENCE IN ITS DEFENSE, OR CROSS EXAMINE WITNESSES, AFTER LOSIER COMPLIED WITH THE COURT'S PRIOR DISCOVERY ORDER?

C. DID THE LOWER COURT ERR IN AWARDING COMPENSATORY DAMAGES FOR HARM TO KALATSCHINOW'S REPTATION AND EMOTIONAL DISTRESS WHERE KALATSCHINOW FAILED TO PRESENT SUFFICIENT EVIDENCE THAT HE SUSTAINED ANY HARM TO HIS REPUTATION OR EMOTIONAL DISTRESS?

D. DID THE LOWER COURT ERR AS A MATTER OF LAW IN DETERMINING THAT APELLANT PICARD LOSIER AND ASSOCIATES WAS VICARIOUSLY LIABLE FOR THE ACTIONS OF ATTORNEY ALEX H. PIERRE?

E. DID THE LOWER COURT ERR IN AWARDING PUNITIVE DAMAGES AGAINST LOSIER?

(ALL ANSWERED IN THE NEGATIVE BELOW)

V. STATEMENT OF THE CASE

On June 8, 2000 Gogol B. Kalatschinow ('kalatschinow') initated a civil action for wrongful use of civil proceedings and abuse of process in the Philadelphia Court of Common Pleas against Picard Losier & Associates ('Losier"), Alex H. Pierre, an associate of the firm ('Pierre'), and a client of the firm, Anthony Bombaci ('Bombaci') (Losier's Reproduced Record (R)26a-36a).

The instant action was predicated upon a civil action initiated by Bombaci against Sassafras International Café, a restaurant owned by Kalatschinow (Bombaci v. Sassafras international Café, Philadelphia Common Pleas Court (CCP) Civil Division, July Term 1998, No. 1257). Attorney Pierre represented Bombaci in the forgoing matter.

In the underlying suit, Bombaci had alleged that he had been assaulted by Kalatchinow, and the suit, was grounded upon the restaurant's breach of duty to ensure Bombaci's saftey. Kalatschinow was not named personally as a defendant in he underlying matter.

Pre-trial proceedings in the underlying matter included the following:

1) Bombaci's delivery to Pierre, an affidavit from one Matthew Curci, identified by Bombaci as an eyewitness to the assault alleged in Bombaci's comlaint (R, 37a);

2) an interview with Bombaci conducted by an investigator for the insurance company for Sassafras International Café on February 5, 1997(R, 38a-57a);

3) interrogatories and requests for documents propounded by Sassafras International Café ('Sassafras') to Bombaci, and answered by Losier (R, 58a-72a) ; and

4) Bombaci's deposition taken on Octoer 2, 1998 (R, 73a-197a)

Throughout pre-trial proceedings, Bombaci cooperated with Sassafras' investigation of the case and gave extensive testimony regarding the incident complained of, his injuries, and the medical treatment he received, identifying Dr. Yves Jerome as his treating physician. However, at the arbitration on December 10, 1998, Bombaci's witnesses failed to appear, and the Arbitrators entered judgment for Sassafras. (R, 198a). Pierre filed an appeal on behalf of Bombaci in Common Pleas Court (R, 199a).

Kalatschinow then moved the Court to preclude Bombaci from introducing expent testimony (R, 200a-232a). The Court then ordered Dr. Jerome to appear and be deposed. At his deposition on May 7, 1999, Dr. Jerome testified that when he received a Subpoena in October 1998, he searched his records, and determined that none existed for Bombaci and that he did not treat Bombaci, for a deposition. (R, 233a;Trial Court Opinion, (Op.),p.3).

Thereafter, Sassafras and Bombaci, by and through counsel, mutually agreed that Bombaci's suit should be withdrawn, and the parties jointly filed a Praecipe to Withdraw the Appeal of the Arbitrator's ruling (R, 258a).

Kalatschinow then instituted the civil action now before this Court for review. On August 14, 2000, after Appellant Picard Losier & associates ('Losier') failed to file a responsive pleading to Kalatschinow's Complaint, the lower court entered default judgment against Losier . On August 21, 2000, Losier timely filed a Petition for Relief from Default Judgment, Preliminary Objections attached thereto, and a Supporting Memorandum of Law (R, 261a-297a). On September 26, 2000, the lower court (per Quinones-Alejandro, J.) denied Appellant Losier's [7] Motion on September 26, 2000 (R, 298a). On October 4, 2000, Losier timely filed a Motion for Reconsideration of the Court's denial on (R. 299a-307a). The Court denied the Motion, without prejudice (R, 308a).

Discovery was propounded by both Kalatschinow and Losier, however, after Losier failed to respond to Kalatschinow's punitive damages interrogatories and requests and requests for documents, Kalatshinow moved the Court to impose sanctions. On July 13, 2001, the Court ordered Losier to respond to Kalatschinow's

discovery requests, and further ordered that if Losier failed to provide discovery, Losier "may be" precluded from offering testimony on Kalatschinow's punitive damages clams (R, 309a). On September 14, 2001, the action was tried before a panel of Arbitrators and was limited to assessment of damages due to the unopened default judgment. The Arbitrators awarded Kalatschinow $25,000.00 in damages, and Losier appealed to Common Pleas Court (R. 310a; 311a).

The dispute over Kalatschinow's discovery requests continued until March 6, 2002, wen the Cort entered sanctioned Losier by precluding him from opposing or introducing any evidence or testimony at trial or from cross-examining any witnesses (R, 312a).

Losier's sole proprietor, Picard Losier, complied with Kalatschinow's discovery requests and was deposed on April 5, 2002 (R, 314a). A non-jury trial took place on June 3, 2002 and June 4, 2002. Kalatschinow had maintained in his complaint (R, 26a, pp31a, 34a, 35a) and pretrial memorandum (R, 343a-346a, p. 344) that he incurred harm to his reputation, emotional distress, attorney's fees and expenses. However, at trial on his damages claim, Kalatshinow failed to prove any economic damages for, or harm to, his reputation, or emotional distress. Kalatschinow further admitted that he had incurred no attorney's fees or expenses (R, 250a, Op.,

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FN1 Matthew Curcl's affidavit was presented at the arbitration hearing.

p19). Nevertheless, the Court entered judgment for Kalatschinow and against Losier, awarding compensatory damages in the amount of $10,000.00 compensatory damages for harm to Kalatscchinow's reputation and emotional distress, $17,000.00 on the basis of vicarious liability for the actions of Alex Pierre, and a separate award of $10,000.00 punitive damages against Losier.

Losier timely filed a Motion for Post-trial Relief (R, 347a-352a). Post verdict motions were denied (R, 353a). Whereupon, Losier appealed to this Court for Relief. Pursuant to PaR.A.P1925(b), on October 21, 2002, the lower court served upon Losier an Order to file a Statement of Matters Complained of on Appeal within 14 days of the date of the Order (R, 354a). On

October 30, 2002, Losier timely complied the Court's order (R, 355a-357a).

VI. SUMMARY OF THE ARGUMENT

The lower Court committed errors of law, abused its discretion, misapplied the laws of this Commonwealth, and denied Losier due process and equal protection of the laws under the Pennsylvania and United States Constitutions, when it unjustifiably denied Losier's Petition for Relief from Default Judgment to allow Losier to defend itself, refused to lift sanctions even after Losier complied with the Court's discovery orders prior to trial, and entered judgment against Losier for both compensatory and punitive damages, where the evidence was insufficient to prove that Kalatschinow (Plaintiff below) had sustained any compensable losses, or that Kalatschinow was entitled as a matter of law to punitive damages, and where Kalatschinow misrepresented to the Court the extent and amount of his damages.

VII. ARGUMENT

A. THE LOWER COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN DENYING LOSIER'S PETITION TO OPEN THE DEFAULT JUDGMENT.

A petition to open a default judgment is an appeal to the equitable powers of the court. The decision to grant or deny a petition to open a default judgment is within the sound discretion of the trial court and will not be overturned absent a manifest abuse of discretion or error of law.
Allegheny Hydro 1. v. American Line Builders, 722 A.2d 189 (Pa. Super. 1998).

The lower court abused its discretion and erred as a matter of law when it denied Losier's Petition for Relief from Judgment By

Default. Pa Rule of Civil Procedure (Pa.R.C.P.) 237.3 provides as follows:

(b) If the petition [for relief from a judgment by default] is filed within ten days after entry of the judgment on the docket, the court ***shall open*** the judgment if the proposed complaint or answer states a meritorious cause of action or defense, (emphasis added)

Rule 237.3(b) effectively mandates that the court open a judgment where the petition is filed within ten days of the judgment, and the answer states a meritorious defense. The requirement that the defense be meritorious means that the petitioner need only plead a defense which, if proven at trial,would justify relief. See Provident Credit Corp. v. Young, 446 A.2d 257, 262 (Pa. Super. 1982) (emphasis added).

Default judgment was entered against Losier on August 14, 2000. Losier filed its Petition for Relief from Judgment by Default ('the Petition') on August 21, 2000, seven days after the entry of default judgment. Therefore, Losier's petition was timely filed. Losier also [10] articulated a meritorious defense in both his initial Petition (R, 261-267a)and his Motion for reconsideration of the Court's prior denial. (R, 301a-306a):

> 1) Both parties in the underlying action had stipulated to the discontinuance of the action.
>
> 2) Plaintiff, by propounding discovery, had waived Losier's default.
>
> 3) Losier had probable cause to commence and continue the underlying action, onn grounds that Losier's Associate Pierre had relied upon Bombaci's statements as well as an affidavit from another person who claimed to have witnessed the incident alleged to have occurred in the underlying complaint.

Losier submits that the lower court denied the firm due process when it pre-judged, on the strength of the allegations in the Kalatschinow's complaint alone, that Losier would not have been able to prove probable cause to initiate and continue the action. It should be noted that the lower court inaccurately stated the

chronology of events culminating in the withdrawal of Bombaci's appeal in the underlying case. Contrary to the court's statement, Bombaci did not file his appeal after Dr. Jerome had given his deposition testimony dening that Bombaci was his patient (R, 246a, Op., p. 16); on the contrary, Bombaci filed his appeal from the arbitrators award in December of 1998, prior to Dr. Jerome's deposition testimony. Dr. Jerome was deposed in May of 1999, several months after the appeal was filed. Thereafter, by agreement of the parties, Pierre withdrew the appeal, prior to trial de novo in the Court of Common Pleas.

The Court below also placed great significance on the fact that Pierre initiated the suit on Bombaci's behalf before obtaining any medical documentation from him (R, 247a; Op., p. 16). Losier submits that the Court placed undue importance on this factor in determining that Losier's associate, Pierre acted recklessly in filing suit. Losier further submits that rarely, if ever, will [11] an injured client bring his medical records to an attorney's office, especially if the client's injuries occurred recently and he has only just begun treatment..

Moreover, Doctors are often reluctant to release medical records to an attorney. Rather, doctors normally require a formal written request for medical records from the attorney, and, such records are never released without written authorization of the patient. It can often take several weeks or months to obtain all the medical records necessary to substantiate a client's claim, especially if the client is still undergoing treatment during the course of the litigation. The more common practice for most attorneys is to prepare and file a complaint based upon the client's statement of the facts, obtaining written authorization from the client for release of his medical records at the same time. Medical records are then requested during the course of the litigation.

Furthermore, it has been held that an attorney is not required to verify the accuracy of his client's statements prior to filing suit, and may rely in good faith upon the statement of facts make to him b his client. Meiksin v. Howard Hanna Co., Inc., et. al., 404 Pa. Super. 417, 420-421,424.590A2.d 1303, 1305, 1306 (1991).

Given the strength of Bombaci's deposition testimony, and the affidavit from Matthew Curci, who purported to have witnessed the assault, it is not inconceivable that a jury might have believed that:

1) prior to Dr. Jerome's deposition testimony, in initiating suit and pursuing Bombaci's appeal Pierre reasonably relied upon his client's statements regarding his injuries and medical treatment he received; and

2) after Dr. Jerome's testimony revealed that Bombaci had probably fabricated his claims, Pierre took prompt action to withdraw the appeal.

[12]

In pre-judging, at the stage of determining whether Losier's pleadings stated a defense to Kalatshinow's claims, that Losier would not be able to prove "probable cause/good faith" defense at trial even if the judgment were opened, the Court exceeded its scope of review of the Petitions for Relief, and denied Losier due process.

In addition to the above defenses, Losier should have been allowed to plead via Preliminary Objections or as an affirmative defense, the fact that Kalatschinow was not a named defendant in the underlying proceedings, and thus lacked standing to bring suit.

On its face, Kalatschinow's complaint failed to allege a key element of a cause of action for wrongful use of civil proceedings and abuse of process: that he was named as a defendant in the underlying civil action giving rise to the cause of action. The reason for such an omission was clear: the record shows that in the underlying case, Bombaci v. Sassafras, Kalatschinow was not personally named as a defendant. The suit was in the nature of a premises liability suit and was directed solely toward the negligence of the Café itself, for failing to provide adequate security to protect customers from assault by employees. 3 If a judgment had been entered against Sassafras International Café, Kalatschinow would not have been personally liable to satisfy the judgment. Therefore, Kalatschinow lacked standing to bring this suit, and that fact appeared of record.

Where, on its face, Kalatschinow's complaint showed that the he did not have standing to initiate the instant action, Losier was entitled to raise that defense via
preliminary objections pursuant to Pa. R. of C.P. 1028(a)(4) (legal insufficiency of a pleading) and/ or 1028(a)(5)(lack of capacity to sue, nonjoinder of a necessary party, or misjoinder of a cause of action).

FN3 **The complaint alleged that Kalatschinow assaulted defendant Anthony Bombaci, a fellow employee of the café. In his complaint, Bombaci alleged that the assault took place after his working hours were over. As such, Mr.** Bombaci was, for purposes of the suit, a business invitee of the cafe.

[13]

On August 21, 2000, when Losier filed its first Petition for Relief to Open Default Judgment, Pa. Rule of Civil Procedure 237.3 provided as follows:

> (a) a petition for relief from judgment of non pros or of default entered pursuant to 237.1 shall have attached thereto a verified copy of the complaint or answer which petitioner seeks leave to file.
> (b) If the petition is filed within ten days after the entry of judgment on the docket, the court shall open the judgment if the proposed complaint or answer states a meritorious cause of action or defense.

(emphasis added).

The comment to Rule to 237.3 in effect at the time Losier filed its first Petition, indicated that the Rule dose not change the law of opening judgments, but only provides that a petition filed within ten days of default is presumptively a timely filed petition. However, the mandatory language providing that the Court "shall" open the judgment if the proposed complaint or answer "states a meritorious cause of action or defense" is directly inconsistent with the comments. Therefore the language of the Rule itself should have controlled, and the Court should have granted Losier's Petition for Relief.

The lower court apparently rested its decision to deny Losier's petition upon the fact that Losier sought leave to file Preliminary Objections, rather than an "Answer" to the Plaintiff's complaint. If that was the court's primary reason for denying Losier's Petition, the court abused its discretion and committed an error of law in not opening the judgment.

The lower Court denied Losier's Petition on the basis that the comments to Rule 237.3 provide that "A defendant who seeks to file a pleading other than an answer is not entitled to the benefit of Rule 237.3 but must comply with the requirements of Schultz v. Erie Insurance [14] Exchange, 505 Pa. 90, 477 A.2d 471 (1984)." However, the court erred as a matter of law, because the amendment to the comments of Rule 237.3, (depriving the benefits of that Rule to those seeking leave to file Preliminary Objections) did not become effective until July 1, 2001, almost a full year after Losier's first Petition had been denied, and two months after his second Petition was submitted. In any event, the comments to the rules are not part of the rules themselves and are intended only as guides to the construction of the rules, not substantive rules in and of themselves. See Pa.R.C.P. 129(e)(A note to a rule or an explanatory comment is not a part of the rule but may be used in construing the rule).

The lower court should not have applied ***the amended comment*** to Rule 237.3 as if it were a substantive rule of law, or applied the amended comment retroactively to the date that Losier filed its first Petition for Relief on August 21, 2000. In applying ex post facto, provisions of a comment to Rule 237.3, which were not in effect until after Losier had filed his Petition for Relief, and which was not a part of the rule, the lower court violated Losier's right to due process and equal protection of the rules of law in effect at the time Losier's petition was filed. See Pa.R.C.P. 128, (providing that in ascertaining the intention of the Supreme Court in promulgating a rule, the courts may be guided by the presumption that the Supreme Court dose not intend to violate the Constitution of the United States or of this Commonwealth).

Furthermore, at the time Losier filed its Petition for Relief the proper interpretation of Rule 237.3 had been enunciated in, Peters Township Sanitary Authority v. American Home and Land Dev. Co., 696 A.2d 899 (Pa. Cmwlth. 1997). In

that case, interpreting Rule 237.3 in *para materia,* with Pa.R.C.P. 1037 and 126, the Court held that a defendant may attach preliminary objections as a proposed responsive pleading, 696 A.2d at 901. The Court noted that Rule 126 [15] requires that "[T]he rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The Court at every stage of any such action or proceeding may disregard any error or defect of procedure which dose not effect the substantive rights of the parties." The Court reasoned further that the Explanatory Comment to subdivision (b) demands the more expansive reading:

> If the petitioner files a petition for relief after entry of the judgment on the docket, the rule requires the court to open the judgment if the **proposed pleading** states a meritorious cause of action or defense.

The appellate court found further support for its interpretation from the comments to Rule 1037 pertaining to Judgment Upon Default or Admission:

> The rule spoke of failure to file "an answer." This left unclear the effect of filing preliminary objections. This rule is changed to refer to "a pleading," a term which under Rule 1017(a) includes both an answer and preliminary objections. The filing of an answer or preliminary objections will clearly prevent the entry of a default judgment.

696 A.2d at 901.

The Court concluded:

> Based upon our review of rules 126, 237.3 and 1037, in conjunction with their associated Explanatory Notes, we conclude that [defendant] did not invalidate its Petition to Open by attaching preliminary objections, rather than a complaint or

> answer, to that Petition, and we believe that the trial court abused its discretion by finding that it did.

696 A.2d at 901.

Furthermore, even if Losier's Petition was "technically" flawed in that Losier sought to file Preliminary Objections rather than an "Answer" to Kalatschinow's Complaint, the Court elevated from over substance, thereby abusing its discretion, by not allowing Losier leave to resubmit the proposed responsive pleading in the form of an answer to the Complaint, so as to comply with Rule 237.3. See **MacGregor v. Mediq,** 395 Pa. Super. 221, 576 A.2d 1123 (1990). [16] Therein, a panel of this Court reversed the trial court's denial of the Appellant's request for leave to amend the pleadings, stating:

> "although the decision of whether to grant leave to amend a pleading is a matter of judicial discretion, such amendments should be allowed at any stage of the proceedings to secure a decision on the merits, unless they violate the law or unfairly prejudice the rights of the other party. (citation omitted). Thus, if no prejudice results, pleadings may be amended after pleadings are closed, while a motion for judgment on the pleadings is pending, at trial, after judgment, or after an award has been made and an appeal taken therefrom." *Biglan v. Biglan*, 330 Pa. Sper. 512, 521, 479 A.2d 1021, 1025-26 (1984)(citations omitted). "The fundamental purpose of this rule is to prevent cases from turning on purely technical defects." Id. At 521, 479 A.2d at 1026.

395 Pa. Super at 227, 576 A.2d at 1126 (emphasis added).

Finally, The Court's elevation of the comments to Rule 237.3 to a Rule of substantive law, and retroactively applying the comments so as to deprive Losier of the right to rise defenses via preliminary objections (a legitimate pleading pursuant to Pa.R.C.P. 1017), violated Losier's right to equal protection of the rules of the

Supreme Court in effect at the time Losier filed its first and second petitions.

Because the lower court erred in the application of the rules of civil procedure, and abused its discretion in not permitting Losier to re-submit its Petition in the format required by Rule 237.3, this Court should reverse the lower Court's denial of Losier's first Petition for Relief from Default Judgment, its Motion for Reconsideration, and its second petition for relief.

B. THE LOWER COURT ABUSED ITS DISCRETION, AND DENIED LOSIER DUE PROCESS WHEN IT REFUSED TO PERMIT LOSIER TO INTRODUCE ANY EVIDENCE IN ITS DEFENSE, OR CROSS-EXAMINE KALATSCHINOW, AFTER LOSIER HAD COMPLIED WITH THE COURT'S PRIOR DISCOVERY ORDERS.

The lower court refused to allow Loiser to introduce any evidence in its defense, or to cross-examine Kalatschinow, on the ground that Losier had failed to comply with previous [17] discovery orders. While PaR.C.P. 4019(c) (2) authorizes a trial court to enter orders prohibiting a disobedient party from introducing evidence at trial. However, that rule does not apply in this matter, since Losier complied with the Court's discovery orders. Losier and Pierre were deposed, on April 5, 2002, and all documents Kalatschinow requested pertaining to Losier and Pierre's finances were disclosed to Kalatschinow well in advance of trial. (June 2-4, 2002).

Once Losier had complied with the Court's discovery orders, the rationale for the imposition of sanctions no longer existed, and the lower court abused its discretion in refusing to rescind the sanctions.

The Court also erred in determining that it lacked any basis to modify or rescind the prior orders of court imposing sanctions. In general, judges of coordinate jurisdiction sitting in the circumstances, this rule can be disregarded. Commonwealth v. Starr, 664 A.2d 1326 (Pa. 1995). These circumstances are defined as a substantial change in the facts or evidence giving rise to the dispute involved or where the prior holding was clearly erroneous

and would create a manifest injustice if followed. Ibid (emphasis added).

In this matter, at the time of the trial on Kalatschinow's claim for damages, Losier had fully complied with the court's prior discovery orders. Furthermore, facts uncovered during discovery and the damages hearing disclosed that Kalatschinow had misrepresented material facts pertaining to the nature and amount of his damages claim. Among other things, Kalatschinow had falsely claimed in his complaint and pre-trial memorandum, that in defending himself in the underlying action, Bombaci v. Sassafras, he had incurred damages in excess of $50,000.00 (Complaint, R, 34a), and attorney's fees and other expenses in the amount of $5,000.00 (Plaintiff's Pre-Trial Memorandum, R, 344a). It was revealed at the trial on [18] Kalatschinow's damages claim, that no such damages fees and expenses had been incurred by Kalatschinow (R, 250a; Op., p.19)

Where, as here, Kalatschinow had clained in his Complaint that Losier had knowingly initiated and continued a false claim against him, and at trial to assess his damages Kalatschinow admitted that he had misrepresented material facts in his complaint and pre-trial memorandum presented to the court, it is clear that Kalatschinow had "unclean hands" in this matter. Kalatschinow's intentional misrepresentations to the Court justified lifting the sanctions previously imposed so that Losier could defend itself under the equitable doctrine of "unclean hands." Equity and due process demanded that, at a minimum, Losier should have been permitted to cross-examine Kalatschinow regarding all of his claims.

Since Losier's situation came squarely within the exception to the rule that courts of coordinate jurisdiction should not overrule each other, it was abuse of discretion and a manifest injustice for the Court not to vacate its prior order prohibiting Losier from introducing evidence in its defense or cross-examining Kalatschinow.

C. THE LOWER COURT ERRED IN AWARDINGCOMPENSATORY DAMAGES FOR HARM TO KALATSCHINOW'S REPUTATION AND EMOTIONAL DISTRESS WHERE KALATSCHINOW FAILED TO PRESENT SUFFICIENT EVIDENCE THAT HE SUSTAINED ANY HARM TO HIS REPUTATION OR EMOTIONAL DISTRESS

With respect to damages in an action brought for wrongful use of civil proceedings, 42 Pa.C.S.A. section 8353 provides as follows:

When the essential elements of an action brought pursuant to his subchapter have been established as provided in section 8351 (relating to wrongful use of civil proceedings) the plaintiff is entitled to recover for the following:

[19]

(1) The harm normally resulting from any arrest or imprisonment or any dispossession or interference with the advantageous use of his land, chattels, or things, suffered by him during the course of the proceedings.
(2) The harm to his reputation by any defamatory matter alleged as the basis of the proceedings.
(3) The expense, including any reasonable attorney's fees, that he has reasonably incurred in defending himself against the proceedings.
(4) Any specific pecuniary loss that has resulted from the proceedings.
(5) Any emotional distress that is caused by the proceedings.
(6) Punitive damages according to law in appropriate cases.

Under 42 Pa.C.S.A. section 8354, the P*laintiff* bears the burden of proving damages provided under section 8353.

Kalatschinow produced no evidence to support an award of damages pursuant to subsections (1) through (3) of section 8353. No evidence was produced to show that Kalatschinow had been imprisoned, dispossessed of his property, or that the lawsuit had interfered with the use of his property or business. The lower Court conceded that Kalatschinow incurred no attorneys fees or other expenses in defending the underlying civil action. Kalatschinow was not the defendant in the underlying action and expenses were paid by the insurance company for Sassafras International Café, not Kalatschinow.

Kalatschinow also failed to prove any specific pecuniary loss of his business under subsection (4). Although Kalatschinow testified that after the suit was filed he lost ten percent of his business, he

produced no evidence of the monetary value of his business ether before or after the suit was failed, so as to enable the Court below to determine the specific amount of his loss.

[20]

The Court acknowledged Plaintiff's failure to prove any specific pecuniary losses or damages (R, 250a; Op., p.19). Nevertheless, despite a total lack of evidence of any pecuniary losses, the lower Court pronounced that Kalatschinow had suffered harm to his reputation and emotional distress and awarded compensatory damages in the amount of $10,000.00 against Losier Picard Losier & Associates.

The Court's award was arbitrary, based on insufficient evidence and against the weight of the evidence. Kalatschinow presented no evidence that his personal reputation in the community had been harmed by the underlying suit, and the court below acknowledged as much in its opinion:

"[Kalatschinow] testified that he felt like his restaurant had a bad atmosphere about it as a result of the lawsuit that was filed by Mr. Bombaci. As a result, two (2) regular customers, Alicia Heck and Debbie Hagedorny, no longer patronized his establishment and he lost ten percent (10%) of his business. *There is no explanation why Alicia and Debbie no longer patronize Mr. Kalatschinow's establishment as they testified in Mr. Kalatschinow's behalf at the arbitration hearing in the underlying matter."*
(R, 250a) (emphasis added).

Because the lower Court lacked any factual basis for its conclusion that Kalatschinow's reputation was harmed by the lawsuit, or that Kalatschinow's restaurant lost patronage because his reputation was harmed as a result of the lawsuit, the Court's award for harm to Kalatschinow's reputation should be vacated. 4

The lower court also awarded damages for emotional distress on the basis of the Superior Court's holding in *Shiner v. Moriarty,* et, al., 706 A.2d 1228 (Pa. Super. 1998), appeal denied, 556 Pa. 639, 523 A.2d 346. *Shiner* held that expert testimony is not required to be presented with regard to emotional distress in causes of action brought pursuant to 42 Pa.C.S.A. [2!] section 8351. While it could be conceded that emotional distress can be established without producing a medical expert, that begs the question of whether, in the trial below, Kalatschinow's testimony

describing his emotional reaction to the underlying lawsuit met the definition of "emotional distress" as those terms have been defined and elucidated in prior appellate decisions of this Commonwealth discussing emotional distress claims. The trial court did not discuss the sufficiency of Kalatschinow's evidence on this issue, apparently on the assumption that any testimony regarding emotions was sufficient to prove emotional distress.

Losier submits that the Pennsylvania legislature never intended to allow recovery of damages when a plaintiff merely feels nervous, scared, disbelief, or similar emotions that a person of normal sensibilities would ordinarily experience in the course of defending himself or participating as a witness in a lawsuit. Losier submits that when the legislature provided for damages for emotional distress, it intended to provide compensation only in those cases where the aggrieved plaintiff suffers emotional stress of such severity as to require treatment by a physician. A contrary interpretation of the terms "emotional distress" would result in verdicts and monetary awards of damages for the slightest emotional reaction.

Under the Statutory Construction Act, 1Pa.C.S.A. section 1922, in ascertaining the intent of the General Assembly, the Court must presume "That the General Assembly dose not intend a legislature surely must not have intended to achieve the absurd result of plaintiffs recovering large damage awards predicated upon the slightest emotional discomfort occasioned by a violation of section 8351. Nor should the court presume that the legislature intended to create

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FN4 Kalatschinow also failed to prove any actual pecuniary losses as a result of losing two of his regular customers.

two different classes of plaintiffs claiming emotional injuries, giving a plaintiff in a section 8351 action strategic advantages over a defendant that a plaintiff alleging Intentional Infliction of Emotional Distress (IIED) would not have. Conversely, a defendant in a section 8351 action is exposed to greater liability for conduct that in many cases will be much less offensive than tat required to prove IIED.

Under section 46 of the Restatement of Torts, 2d, to establish a cause of action for IIED, the plaintiff must prove that the defendant's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Under section 8351, a plaintiff need prove only that the defendant's actions were grossly negligent, or without probable cause and for an improper purpose. 42 Pa..C.S.A. 8351(A) (1). Therefore, a plaintiff in a section 8351 case need not prove that the defendant's conduct was outrageous or extreme in order to recover for emotional distress.

Except in the most egregious cases, it is difficult to imagine that wrongful use of civil proceedings would involve conduct "so extreme in degree as to go beyond all possible bounds of decency", "atrocious", and "utterly intolerable in a civilized community." Therefore, Losier submits that it is unjust, inequitable, and unreasonable to deny recovery to victims of truly outrageous acts on the basis that they are unable to present expert medical testimony of their emotional injuries, while permitting recovery to victims of far less offensive conduct upon the basis of lay testimony alone.

The unequal burdens of proof for essentially the same injury actually encourages people to commit outrageous acts against a would be adversary, rather than chance initiating suit to

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FN5 Losier had filed a motion in limine to bar Kalatchinow from presenting any evidence of his emotional claims, absent medical testimony.

Settle their differences, upon pain of subsequently having to defend oneself in a section 8351 action. Under the unequal standards of justice now I force pursuant to *Shiner*, persons whose conduct is so outrageous that it cannot be tolerated in a civilized society can rest assured that when their victim comes to court, her burden of proving that she suffered emotional distress will be great, while the person whose conduct is less extreme or outrageousness, may find himself liable for great damages upon the slightest proof of emotional injuries.

One need only examine Kalatschinow's selective choice of remedies in the action below to see the mischief to be averted if section 8351 actions and IIED claims were made subject to the same burden of proof. In Kalatschinow's complaint, Losier was charged with behavior that was "extreme and outrageous" (Complaint, R, 33a-34a, Count I par. 29; Count II, par. 36). Extreme and outrageous behavior is an element in a cause of action for IIED. However, Kalatschinow's learned counsel, no doubt aware of the higher burden of *proving* emotional distress in IIED cases, wisely omitted from the complaint a claim for IIED. Thus, Kalatschinow was able to recover monetary damages upon little or no evidence of emotional injury. The legislature cannot be presumed to have intended such an absurd result.

Losier asserts that due process and equal protection require that a plaintiff seeking to recover damages for emotional distress under 42 Pa.C.S.A. section 8353, should be required to meet the same burden of proof required of a Plaintiff seeking recover for IIED, as elucidated in the Pennsylvania Supreme Court's opinion in Kazatsky V King David Memorial Park, 515 Pa. 183 (1987). Therein, the Court stated the proper standards for determining when an emotional response to a given event or events will constitute "emotional distress' of the kind justifying the award of compensatory and punitive damages. Citing its decision in Sinn v. Burd, 486 Pa. 146, [24] 404 A.2d 672 (1979), the Court established an objective standard for the recovery of damages, limiting recovery for:

"serious mental distress to situations where a reasonable person normally constituted would be unable to adequately cope with the mental stress engendered by the circumstances of the event."

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515 Pa. at 193. (other citations omitted)(emphasis added). After discussing the inherent difficulties in distinguishing between the outrageousness of the defendant's conduct and the plaintiff's resultant injury, the Court held as follows

It is basic to tort law that an injury is an element to be proven. Given the advanced state of medical science, it is unwise and unnecessary to permit recovery to be predicated on an inference based on the defendant's "outrageousness" without expert medical

confirmation that the plaintiff actually suffered the claimed distress. Moreover, the requirement of some objective proof of severe emotional distress will not present an insurmountable obstacle to recovery. Those truly damaged should have little difficulty in procuring reliable testimony as to the nature an extent of their injuries. We therefore conclude that if section 46 of the Restatement is to e accepted in this Commonwealth, at the very least, existence of the alleged emotional distress must be supported by competent medical evidence.

515 Pa. at 197.

Losier asserts that Kazatsky enunciated the proper application of the law in this Commonwealth, and that under the standards set forth therein, Kalatschinow failed to prove that he suffered the kind of emotional distress which the legislature intended to be compensable under 42 Pa. C.S.A. section 8351.

The case cited by the lower court in support of its award of damages for harm to Kalatschinow's rreputation and emotional distress, *Cilo v. Shields*, 33 Pa. D. & C. 4th, 10(Pa. Com. Pl. 1996) lacks precedential authority and is easily distinguished from Kalatschinow's situation. In *Cilo*, the plaintiff was an attorney who bought suit for wrongful use of civil proceedings against the husband of one of his clients. The trial court awarded compensatory [25] damages for the attorney's claims for emotional distress and harm to the attorney's reputation, based upon the fact that the defendant's filing of the complaint against the attorney in Common Pleas Court was not only open to the public, members of the bar, courthouse employees, and Judges of the court wherein he regularly practiced. Additionally, the time consumed in preparing his defense in the civil action had distracted him from his regular practice of law. In *Cilo*, because the plaintiff was an attorney, the defendant's filing of the lawsuit had an immediate negative impact upon the attorney's reputation, law practice, and emotional state.

Unlike the attorney in *Cilo*, Kalatschino was not personally named as a defendant in the underlying litigation (Bombaci v. Sassafras International Café). Therefore, it is impossible to imagine how the filing of the lawsuit in and of itself, could have negatively affected his personal reputation on the community. More importantly, Kalatschinow presented no evidence that his

reputation in the community had in fact been harmed. As the court below noted, there was no explanation as to why two of his regular customers stopped coming to Kalatscchinow's restaurant, as it was apparent from the record that those same customers had testified for Kalatschinow at the Arbitration hearing on the underlying case, and therefore, did not believe that Kalatschinow had committed the acts complained of. Therefore, the Court below was left with Kalatschinow's unsupported imaginary belief that his reputation had been harmed. Therefore, in concluding that Kalatschinow was in fact harmed, the Court below engaged in pure conjecture.

Furthermore, unlike the attorney in Cilo, Kalatschinow presented no evidence whatsoever that he was so emotionally distracted by the lawsuit that he was unable to carry out his regular business and social activities, or unable to adequately cope with unfolding events in connection with the lawsuit.

[26]

In conclusion, Losier submits that, by establishing unequal standards of proof for plaintiffs seeking to recover damages for emotional distress under section 8351 than for Plaintiffs in IIED cases, this Court's prior decision in *Shiner* created a legal distinction without a difference, between plaintiffs seeking redress for essentially the same injury. In so doing, the Court denied Losier, defendants in a section 8351 action, due process and equal protection of the laws under both the United States and Pennsylvania Constitutions. Indeed, the lower burden of proof for plaintiffs who claim to have suffered emotional distress pursuant to 42 Pa.C.S.A. section 8353 opens the very floodgates of frivolous litigation about which our Supreme Court expressed legitimate concern in its opinion *in Kazatsky*.

Therefore, Losier request that this Court overrule its holding in *Shiner*, to the extent that said holding overruled our Supreme Court's holding in Kazatsky by implication, established a lower burden of proof for plaintiffs seeking damages for emotional distress in a section 8351 action than for plaintiffs seeking similar damages for IIED, and created two unequal classes of defendants in emotional distress cases.

Finally, even if this Court finds that the standards for *admissibility* of Kalatschinow's testimony set forth in *Shiner* for proving emotional distress complies with due process and equal

protection of the laws, Losier nevertheless requests that this Court reverse the decision of the lower court on the ground that Kalatschinow's testimony as to his emotional reactions to the underlying lawsuit was insufficient as a matter of law to prove that he suffered "emotional distress" as that term was defined by the Supreme Court of this commonwealth. See Kazatsky, supra.

[27]

D. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT THE COURTS' FINDING THAT APPELLANT PICARD LOSIER & ASSOCIATES WAS VICARIOUSLY LIABLE FOR THE ACTIONS OF ATTORNEY ALEX H. PIERRE

The lower court determined that Losier is vicariously liable for the acts of attorney Pierre under the theory that "a master is a principal that is responsible for the acts of his agent, a servant on the basis of vicarious liability due to the nature of control retained by the master" (R, 253a, Op. p.22). The problem with the lower court's finding is that there is no evidence in the record that the relationship between Losier and attorney Pierre was that of master and servant. While the court below may have correctly stated the general rule, the court failed to properly analyze and apply the law pertaining to principal and agent, master and servant, and therefore reached the wrong conclusion with respect to Losier.

Not every relationship of principal and agent forms the basis of vicarious liability of the principal for the acts of the agent. To establish tort liability of the principal for the acts of his agent, the plaintiff must show that the agent was subject to the principal's control over the details of his performance of the task for which he was appointed. See Shiner v. Moriarty, 706 A.2d at 1240 (Pa. Super. 1998). See also, Smallich v. Westfall, 440 Pa. 409, 269 A.2d 476 (1970), wherein it was explained that only the degree of control involved in a master-servant relationship, a subspecies of agency, is sufficient to establish vicarious tort liability.

There is no evidence in the record to support the lower court's conclusion that the relationship between Losier and Pierre was that of Master and Servant, since no evidence was presented that Losier retained any control over Pierre's handling of cases on Losier's

behalf in general, or with respect to the underlying case forming the basis of Kalatschinow''s action below.

[28]

The interrelationship between the concepts of principal and agent, master and servant and the circumstances which will give rise to vicarious liability of the principal for the acts of his agent were eloquently explained by a panel of his Honorable Court in Juarbe v. City of Philadelphia et., al., 288 Pa. Super. 330, 431 A.2d 1073 (1981). In summary, a principal will be vicariously liable for the acts of his agent only if two conditions are met:

(1) the relationship between the principal and his agent must e that of master and servant, rather than independent contractors; AND

(2) the principal (master) must retain control over the agent's (servant's) performance of work on behalf of the principal.

The Court explained as follows:

> A principal and agent can be in the relationship of a master and servant, or simply in the status of two independent contractors. See *Smallich v. Westfall*, 440 Pa. 409, 269 A.2d 476 (1970); *Turley v. Kotter*, 263 Pa. Super. 523, 298 a.2d 699 (1979). If a particular agent is not a servant, the principal is not considered to be a master who may be held vicariously liable for the negligent acts of the agent (citations omitted). A servant is an agent whose ***physical conduct*** in the performance of the service is ***controlled or is subject to the right of control*** by the master ; that is, a master controls not only the ***results*** of the work, but the ***manner*** in which the work is to be performed.

288 Pa. Super. At 335 (emphasis in the original). Since an agent who is not a servant is not subject to any right of control by his principal over the details of his physical conduct, the responsibility

rests upon the agent alone, and the principal is not liable for harm caused by his unauthorized negligent physical conduct. Gajkowski v. International Brotherhood of Teamsters, 350 Pa. Super. 285, 302; 504 A.2d 840, (1986) (emphasis in original).

The record presented below established that at the time the underlying lawsuit was filed, April 15 1998, and for several years thereafter:

[29]

(1) attorney Alex H Pierre ('Pierre') was employed by Losier (a sole proprietorship) as an independent contractor to perform work on personal injury and other matters which fell outside of Losier's primary practice of law, workers' compensation;

(2) Losier exercised no control over Pierre's handling of cases assigned to him or bought by him to the firm;

(3) Losier retained no right to control Pierre's handling of cases in this area of practice; and

(4) With respect to Pierre's representation of Mr. Bombaci, in the underlying matter, Losier had no involvement in the matter, exercised no control over Pierre's handling of the matter, and retained no right to exercise control over Pierre's handling of the matter.

In his deposition on April 5, 2002 6 Losier's owner and proprietor, Picard Losier ('P.L.') testified that Pierre, was an independent contractor associated with the firm to handle personal injury and other types of cases outside of the firm's primary area of practice, workers compensation. (P.L. Deposition (Dep.), R, 315a-316a, 319a; Dep., pp. 8-12, 21-24). P.L. testified that depending upon the source of the business, Pierre received either a draw or a percentage of his productivity which varied from thirty to fifty percent (R, 318a: Dep., pp. 17-18).

With respect to management of the work of the firm, P.L. testified that Pierre had authority to handle litigation as he felt appropriate, tat he did not "micromanage" and trusted people to do the right thing, and that he trusted Pierre's judgment, expected him to handle his caseload and do whatever had to be done (R, 319a-

320a; Dep., pp.21-24, 28).7 Additionally, P.L. testified that he gives Pierre a 1099 tax form and takes no taxes out of Pierre's compensation. (R, 329a, Dep., p.63).

FN 6 R, 314a-342a.

FN 7 The record reflects that even with regard to the matter instantly before this Court, Picard Losier trusted that Mr. Pierre would handle the defense of the law firm without his intervention (R, 323a, Dep., pp. 37-38).

With respect to Bombaci v. Sassafras International Café, the underlying matter upon which Kalatschinow based the instant cause of action, P.L. testified that he did not know Anthony Bombaci, that he did not know that Bombaci had been a client of the firm until after Kalatschinow's complaint had been filed, and that after that he learned of the details of Bombaci's case; that Pierre was responsible for handling the case as he saw fit and that he had no involvement at all in the handling of the Bombaci matter (R, 318a, Dep., pp20-22; R, 321a3, Dep., pp 29-30).

The record supports Picard Losier's testimony. In the underlying case, Pierre prepared and verified Bombaci's complaint, conducted all discovery, answered the interrogatories and other requests for discovery propounded by Kalatschinow's counsel, attended the deposition of both Anthony Bombaci and Dr. Yves Jerome, whom Mr. Bombaci had identified as his treating physician. Pierre also attended the arbitration hearing at which Kalatschinow prevailed. Pierre prepared and filed an appeal on Bombaci's behalf in Philadelphia Common Pleas Court. Pierre also prepared and filed the Praecipe to Withdraw Bombaci's appeal from the Arbitrators decision.

Sensing that there was a problem with Kalatschinow's evidence with respect to the issue of Losier's control over Pierre's conduct of the underlying case, the Court characterized Pierre as an "employee" based upon the fact that he was at times a salaried employee compensated via a "draw" against the firm's funds, prior to being compensated based upon his productivity and performance (R, 318a, Dep., pp18-19). However, the manner in which Losier compensated Pierre for work assigned to him or brought by him to the firm, is immaterial to the issue of whether

there was a master-servant relationship between Losier and Pierre, and cannot be used as a basis for imposing vicarious liability upon Losier. See Turley v. Kotter, 263 Pa. Super.

[31]

523, 398 A.2d 699 (1979). In that case, it was contended that the method of calculating a truck driver's compensation and fringe benefits established a master-servant relationship between the driver and the owner of the trucking company who had engaged his services. The Superior Court rejected that contention:

> "The lease which provided for the method by which each party's compensation was to be determined stated that the owner's share was to be 72% of gross revenue... The gross earnings of the driver and all fringe benefits due to the driver were to be deducted from the 72% gross revenue and the difference paid to the owner as equipment rental. Therefore Plaintiff's compensation was directly linked to the efficiency of the driver's performance. However, this situation does not establish that Plaintiff had control over the driver. In many instances the performance of a servant of a party to a contract will have a direct hearing on the profits made by the other party to a contract. This does not establish a master-servant relationship between the employee and the other party to the contract.

267 Pa. Super at 532.

Therefore, the manner in which Pierre was compensated for his services did not prove a master-servant relationship between Losier and Pierre, and the Court erred in finding that it did.8

The question is whether, from the time that Bombaci v. Sassafras International Café was initiated, until the action was withdrawn, Pierre was an employee subject to the firm's control, or an independent contractor with full control over cases referred to or bought by him to the firm. The record shows that during the time period in question, Pierre's relationship with Losier was that of an independent contractor.

The Court also imposed liability on Losier because Pierre's work on the Bombaci case was "within the scope and course of his employment." (R, 254a-255a; Op., 23-24). This fact is irrelevant, since the issue is not whether Pierre's work on the Bombaci case was within the scope and course of his employment, but whether Losier exercised control over the work performed by

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FN 8 It should be noted that the court acknowledged that Losier did not provide insurance or other benefits for Pierre. (R, 255a; Op., p24)

Pierre in Bombaci v. Sassafras International Café. The record shows that Losier did not at any time exercise control over or direct Pierre in the conduct of that litigation. In fact, Losier's principal, Picard Losier, was not even aware that Bombaci was one of the firm's clients until Kalatschinow initiated the instant action (R, 318a, 321a; Dep., pp. 20-29).

Therefore, the lower Court lacked any basis for imposing vicarious liability upon Appellant Picard Losier & Associates for the actions of Pierre.

E. THE COURT ERRED IN AWARDING PUNITIVE DAMAGES AGAINST LOSIER.

Punitive damages must be based on conduct that is malicious, wanton, reckless, willful, or oppressive. Dean Witter Reynolds, Inc. v. Genteel, 346 Pa. Super. 336, 499 A.2d 637, 642-43 (1985). The record shows that Losier is a sole proprietorship, and that the principal attorney of the firm, Picard Losier, primarily practices workers compensation law. The record further shows that Picard Losier engaged attorney Pierre to handle personal injury cases and other matters not within Losier's primary area of practice, and that Pierre had full control over the conduct of cases to which he was assigned or which he himself brought into the firm. With respect to the underlying matter giving rise to Kalatschinow's cause of action, neither Losier nor any associate at the firm, other than Pierre, participated in the conduct of that case.9 Not only did Kalatschinow fail to prove that Losier's conduct was malicious, wanton, redkless,willful, or oppressive, See Witter, supra,

Kalatschinow failed to prove that Losier engaged in conduct of any kind, with respect to the underlying matter. Therefore there was nofactual basis supporting the Court's award of punitive damages against Losier.

FN 9Contrary to the trial court's assertion, Pierre was not "the" associate. Sharon Williams Losier, Picard Losier's wife, is also an associate with the firm. (R, 315a-316a; Dep., pp. 8-16)

In awarding punitive damages against Losier, the Court relied upon Kalatschinow's allegations in the Complaint of outrageous conduct and entitlement to punitive damages. The court's reliance is misplaced. First, Kalatschinow's legal conclusions as to his entitlement to punitive damages are deemed to be denied by the Pa. Rules of civil Procedure, and Losier was not required to answer those allegations. Therefore, the default judgment entered against Losier did not automatically entitle Kalatschinow to punitive damages. Second, since Kalatschinow did not specifically state the amount of punitive damages claimed, Pa.R.C.P. 1037 required that he prove facts entitling him to punitive damages. Third, 42 Pa.C.S.A. § 8353 specifically places the burden on the plaintiff, Kalatschinow, to prove facts entitling him to punitive damages.

Furthermore, even if liability for punitive damages was factually established upon entry on the default judgment, the Due Process Clause of the Fourteenth Amendment to the United States Constitution protects a tortfeasor from the imposition of a "grossly excessive" punitive damages award. See Shiner, 706 A.2d at 1241 (1996), citing BMW of North America Inc., v. Gore, 517 U.S. 559, 560-61, 116 S.Ct. 1589, 1592, 134 L.Ed. 2d 809, 818 (1996). The size of the punitive damages award must be reasonably related to the State's interest in punishing and deterring the particular behavior and not the product of arbitrariness or unfettered discretion. Id. At 567-68, 116 S.Ct. at 1595, 134 L. Ed. 2d at 822.

In Gore, the United States (U.S.) Supreme Court erected three guideposts for Courts in reviewing the propriety of a punitive damages award. These are the degree of reprehensibility of the defendant's conduct, the ratio of punitive damages to the actual or potential harm inherent in that conduct, and the existing civil and criminal penalties for similar conduct. Gore, at 573-82, 116 S. Ct. at 1598-1603, 134 L. Ed 2d at 826-33.

Recently, the U.S. Supreme Court has further amplified the standards established by Gore, in the case of State Farm Mutual Auto Insurance Co. v. Campbell, Sup. Ct. Docket No. 01-1289, 2003 LEXIS 2713 (April 7, 2003). Therein the Court warned against the dangers of unfettered Court discretion. The Court recognized that punitive damages are imposed "for purposes of retribution and deterrence" and that punitive damages awards "serve the same purposes as criminal penalties." Id., at 2717-18. Because greater discretion is given fact-finders in civil trials as opposed to criminal trials, there exists a greater danger that the award may be grossly excessive to the point of causing arbitrary harm. Therefore, the Court reasoned, it is imperative that an award of punitive damages be based "upon an 'application of law', rather than "a decision maker's caprice." Id., at 2719-20.

Further explicating the guidelines set forth in Gore, the Campbell Court set forth the factors the Court must consider in determining whether a tortfeasor's conduct is sufficiently reprehensible to warrant imposing punitive damages:

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortuous conduct evinced as indifference to or reckless disregard of the health or safety of others; the target of the conduct ha financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. At 20. The Court further stated: "[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award: and the absence of them all renders any award suspect." Id. (emphasis added).

Considering the about factors, it is readily apparent that it was not proven that Losier engaged in any conduct with respect to the underlying matter that caused Kalatschinow to suffer either physical or economic harm. Losier did not participate in or control Pierre's or Bombaci's [35] actions in the underlying matter.

Second, Kalatschinow was not "the target" of Pierre and Bombaci's suit, and was not financially vulnerable. Kalatschinow had no pecuniary losses associated with the underlying matter. In fact, it was apparent at trial that Kalatschinow had exaggerated and misrepresented his damages. Kalatschinow failed to prove any economic losses to his business, harm to his reputation, or emotional distress beyond that which any adult of normal sensitivity would ordinarily feel when confronted with a lawsuit. Kalatschinow incurred no attorney's fees or expenses as claimed in his complaint. Therefore Losier's economic losses and injuries were largely unsubstantiated.

Third, it cannot be said that Losier engaged in any repeated pattern of offensive conduct toward Kalatschinow. Even when one considers Pierre and Bombaci's filing of the appeal from the adverse award of the arbitrators, that one act fails as a matter of law to constitute the kind of conduct warranting punitive damages, since the period of time Kalatschinow was involved in the suit was relatively brief (April 1998 to sometime in May 1999), and after it became apparent that Bombaci's claims had no merit, the appeal was promptly withdrawn before trial in Common Pleas Court.

In this Commonwealth, in wrongful use of civil proceedings cases, the Courts have awarded punitive damages against attorneys only in the most egregious cases. See Shiner, supra. In that case, the Superior Court upheld a punitive damages award of $1,000,000 against a law firm and its individual attorneys, where it was shown that in representing tenants attempting to prevent a lawful eviction, over a five year period the tenant's attorneys used every available legal mechanism against the tenants' former landlords, repeatedly filing numerous petitions for a stay of execution and injunctive relief, and several appeals in the Allegheny County Court of [36] Common Pleas, Pennsylvania Superior and Supreme Courts, United States (U.S.) Bankruptcy Court, and the U.S. Court of Appeals for the Third Circuit.

Finally, Kalatschinow failed to prove that Losier was involved in any acts of malice, trickery or deceit, even if such acts could be attributable to Pierre and Bombaci. It really serves no rational purpose to punish someone who was not involved in the offensive conduct. Therefore, Losier should not be responsible for punitive damages awarded on the basis of vicarious liability for Pierre's actions or the punitive damages separately awarded against the firm. 10

However, should this Court find that the award of punitive damages against Losier were properly imposed according to the standards set forth in Gore and Campbell, then Losier submits that the amount of the punitive damages awarded was excessive. While the Campbell Court was reluctant to set forth a bright line ratio of compensatory to punitive damages that would be appropriate, the Court declared that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Campbell, at 30-31. Here, the compensatory damages of $10,000 are substantial in comparison to the actual harm suffered by Kalatschinow. Yet the punitive damages awarded against Losier is almost three times the amount of the compensatory damages.

Moreover, in determining the amount of a punitive damages award, the Court was required to consider the civil and criminal penalties authorized or imposed in comparable cases, and the wealth of the defendant. The Campbell Court acknowledged that comparable criminal penalties are more often examined when punitive damages are awarded. It should be noted that a violation of analogous criminal statutes, filing a false statement or claim with an insurance [37] company, (18 Pa.C.S.A. § 4117), carries a maximum financial penalty of $5,000.00 for a first offense. The court's award is more than five times that amount.

Finally, in awarding punitive damages, the trier of fact can properly consider the wealth of the defendant. Kirkbride v. Lisbon Contractors, Inc., 521 Pa. 97; 555 A.2d 800 (1989). The record below showed that for the five year period from 1996 to 2000, Losier's average net yearly income was $103,970.00. The Court held that Losier is vicariously liable for the punitive damages award against Pierre in the amount of $17,000.00 and awarded punitive damages separately against Losier in the amount of $10,000.00, for a total of $27,000.00. This amount equals almost one-third of Losier's average net income. In light of Kalatschinow's failure to prove that Picard Losier was personally involved in the initiation or continuation of the underlying action, or that he directed Alex Pierre in the conduct of that action, and Kalatschinow's unsubstantiated economic and emotional damages, 11 the Court's $27,000.00 judgment for punitive damahges was clearly excessive, grossly out of proportion to the actual harm

suffered by Kalatschinow, arbitrary, capricious, and unreasonable. Losier requests that this Court so hold.

FN 10Since the Firm is in fact a sole proprietorship, Picard Losier is personally responsible for any damage award.
FN 11The Court rewarded Kalatschinow for engaging in the same conduct (filling a false claim for economic losses, attorney's fees and expenses) for which Kalatschinow brought suit against Losier, Pierre and Bombaci.

[38]

VIII. CONCLUSION

The lower Court committed errors in interpreting and applying the laws of this Commonwealth, abused its discretion, based its judgment on insufficient evidence, and entered a judgment that was arbitrary, capricious, and grossly disproportionate to the harm suffered by Kalatschinow. Furthermore, the Court denied Losier due process, and equal protection of the laws, and violated the prohibition against the application of ex post facto laws under the Pennsylvania and United States Constitutions. For any or all of the foregoing reasons, the judgment of the Court should be reversed and the action dismissed or remanded for a new trial on the merits.

Respectfully submitted,
Picard Losier & Associates,
Appellant/Cross-Appellee
BY:

/s/_____
Sharon Williams Losier, Esquire

PENNSYLVANIA SUPERIOR COURT OPINION
(ORIGINAL PAGE NUMBERS OF OPINION APPEAR IN BRACKETS [ ] WITHIN AND AT TOP OF TEXT)

NON-PRECEDENTIAL DECISION-SEE SUPERIOR COURT I.O.P. 65.37

GOGOL KALATSCHINOW	:	IN THE SUPERIOR COURT OF
Appellee	:	PENNSYLVANIA
V.	:	
ALEX H. PIERRE, ESQ.,	:	
PICARD LOSIER &	:	
ASSOCIATES AND	:	
ANTHONY BOMBACI,	:	
Appellants	:	
	:	
APPEAL OF PICARD	:	
LOSIER & ASSOCIATES	:	NO. 2993 EDA 2002

Appeal from the judgment Entered October 30, 2002
In the Court of Common Pleas of Philadelphia County
Civil No. 0917 June Term 2000

BEFORE: STEVENS, OLSZEWSKI, and BECK, JJ.
MEMORANDUM: **FILED MAY 18, 2004.**

Appellants/Cross Appellees, Alex H. Pierre, Esquire, (Attorney Pierre) and Picard Losier & Associates (Picard Losier), and Cross Appellant/Appellee, Gogol B. Kalatschinow (Mr. Kalatschinow), appeal from the judgment entered in favor of Mr. Kalatschinow by the Court of Common Pleas of Philadelphia County following the denial of the parties' motions for post-trial relief. We affirm, in part, vacate, in part, and remand for proceedings consistent with this decision.

FN 1 Although Attorney Pierre and Picard Losier initially filed their notices of appeal from the trial court's order denying their post-trial motions, judgment was subsequently entered on October 30, 2002; therefore, this appeal is properly before us. ***See***

Johnston the Florist, Inc. v. Tedco Construction Corp., 657 A.2d 511 (Pa.Super. 1995); ***See also*** Pa.R.A.P. 301,905. We further note that although Anthony Bombaci was a party in the underlying action, he is not a party in this appeal.

The court aptly summarized the protracted history of this case as follows: [what initially follows in the Superior Court's Opinion is a verbatim re-statement of the history of the matter as it appears in the trial court opinion (A-1), followed by a verbatim re-statement of the Questions Presented for Review appearing in the brief submitted to the Pennsylvania Superior Court by Appellants/Cross Appellees Losier (A-2) and Pierre, and Appellee /Cross Appellant Kalatschinow. Petitioner reproduces only that portion of the Pennsylvania Superior Court's opinion which addresses the issues raised by Losier .]

[8]

As to Picard Losier's claims ... we have thoroughly reviewed the arguments and briefs of the parties and the record before us, and have examined closely the trial court's resolution of the matter. We are in agreement with the court's disposition, and rely on the well-reasoned and thorough March 25, 2003 Opinion of the [9] Honorable Barbara A. Joseph. FN 2 . (footnote omitted)

Finally, as noted above, Mr. Kalatschinow contends that the court erred in failing to mold the verdict to provide that the punitive damages award imposed on Attorney Pierre be directed and collectible against his employer, Picard Losier, under the doctrine of vicarious liability. In the trial court's March 25, 2003 Opinion, it examined and discussed the doctrine of vicarious liability and the facts of the present case and concluded as follows: "Picard Losier & Associates are vicariously liable for punitive damages as the result of [Attorney Pierre's] actions. Accordingly, this court's finding should be corrected to make Picard Losier & Associates additionally responsible for the judgment of punitive damages against [Attorney Pierre]." Trial Court Opinion iussued 3/25/03 at 23. We agree that the verdict should reflect the vicarious liability of Picard Losier, and therefore, we remand and direct the verdict to be so remedied. In all other respects, we affirm.

Judgment Affirmed, in part; Vacated in part; Remanded; Jurisdiction Relinquished

PICARD LOSIER AND ASSOCIATES' PETITION FOR ALLOWANCE OF APPEAL FILED IN THE SUPREME COURT OF PENNSYLVANIA

(ORIGINAL PAGE NUMBERS OF PETITION APPEAR IN BRACKETS [ ] WITHIN AND AT TOP OF TEXT)

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

RECEIVED
JUN 17 2004
SUPREME COURT
EASTERN DISTRICT

GOGOL B. KALATSCHINOW :
V. :
ALEX H. PIERRE, :
PICARD LOSIER & ASSOCIATES : No. _____
And :
ANTHONY BOMBACI :

PETITION FOR ALLOWANCE OF APPEAL

Petition for allowance of appeal from the Order of the Superior Court issued May 18, 2004, at Docket No. 2993 EDA 2002, affirming the Order of the Court of Common Pleas of Philadelphia County issued October 30, 2002 at Docket No. 0917; June Term 2000

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1. OPINIONS DELIVERED BELOW

Kalatschinow v. Pierre *et al.*, No. 2993 EDA 2002, Superior Court Memorandum issued May 18, 2004.

Kalatschinow v. Pierre *et al.*, No. 0917, June Term 2000, Philadelphia Court of Common Pleas, Order entered October 30, 2002.

2. ORDER IN QUESTION

"Judgment Affirmed, in part; vacated in part; Remanded; Jurisdiction Relinquished."

3. QUESTIONS PRESENTED FOR REVIEW

A. DID THE SUPERIOR COURT ERR WHEN IT ADOPTED AND AFFIRMED THE REASONING OF THE TRIAL COURT THAT THE LOWER COURT DID NOT ERR AS A MATTER OF LAW BY DENYING APPELLANT'S PETITIONS FOR RELIEF FROM DEFAULT JUDGMENT?

SUGGESTED RESPONSE: YES

B. DID THE SUPERIOR COURT ERR WHEN IT ADOPTED AND AFFIRMED THE REASONING OF THE TRIAL COURT THAT THE LOWER COURT DID NOT ERR BY AWARDING COMPENSATORY DAMAGES FOR HARM TO APPELLEE'S REPUTATION AND EMOTION DISTRESS WHERE THE AWARD WAS NOT SUPPORTED BY THE EVIDENCE?

SUGGESTED RESPONSE: YES

C. DID THE SUPERIOR COURT ERR WHEN IT ADOPTED AND AFFIRMED THE REASONING OF THE TRIAL COURT THAT THE LOWER COURT DID NOT ERR BY AWARDING PUNITIVE DAMAGES AGAINST APPELLANT?

SUGGESTED RESPONSE: YES

4. STATEMENT OF THE CASE

On June 8, 2000 Gogol B. Kalatschinow ('Kalatschinow') initiated a civil action for wrongful use of civil proceedings and abuse of process in the Philadelphia Court of Common Pleas against Picard Losier & Associates, Alex Pierre, an associate of the firm, and a client of the firm, Anthony Bombaci. The instant action was predicated upon a civil action initiated by Bombaci against Sassafras International Café, a restaurant owned by Kalatschinow (Bombaci v. Sassafras International Café, Philadelphia Common Pleas Court (CCP) Civil Division, July Term 1998, No. 11257). Attorney Pierre represented Bombaci in the foregoing matter.

In the underlying suit, Bombaci had alleged that he had been assaulted by Kalatschinow, and the suit was grounded upon the restaurant's breach of duty to ensure Bombaci's safety. Kalatshinow was not named personally as a defendant in the underlying matter.

Thoughout pre-trial proceedings, Bombaci cooperated with Sassafras' investigation of the case and gave extensive testimony regarding the incident complained of, his injuries, and the medical treatment he received, identifying Dr. Yves Jerome as his treating physician. However, at the arbitration on December 10, 1998, Bombaci's witnesses failed to appear, and the Arbitrators entered judgment for Sassafras. Pierre filed an appeal on behalf of Bombaci in Common Pleas Court.

Kalatschinow moved the Court to preclude Bombaci from introducing expert testimony. The Court then ordered dr. Jerome to appear and be deposed. At his deposition on May 7, 1999, Dr. Jerome testified that when he received a Subpeona in October 1998, he searched his records, and determined that none existed for Bombaci and that he did not treat Bombaci.

Thereafter, Sassafras and Bombaci, by and through counsel, mutually agreed that Bombaci's suit should be withdrawn, and the parties jointly filed a Praecipe to Withdraw the Appeal of the Arbitrators' ruling.

Kalatschinow then instituted the civil action now before this Court for review. On August 14, 2000, after Appellant Picard Losier & Associates failed to file a responsive pleading to Kalatschinow's Complaint, the lower court entered default judgment against Losier.

On August 21, 2000, Losier timely filed a Petition for Relief from Default Judgment, Preliminary Objections, and a Supporting Memorandum of Law. The lower court denied Appellant Losier's Motion on September 26, 2000; Losier filed a timely Motion for Reconsideration of the Court's denial, and the Court again denied the Motion.

Discovery was propounded by both Kalatschinow and Losier; however, after Losier failed to respond to Kalataschinow's punitive damages interrogatories and requests for documents, Kalatschinow moved the Court to impose sanctions. On July 13, 2001, the Court ordered Losier to respond to Kalatschinow's [4] discovery requests, and further ordered that if Losier failed to provide discovery Losier might be precluded from offering testimony on Kalatschinow's punitive damages claims. On September 14, 2001, the action was tried before a panel of Arbitrators and was limited to assessment of damages due to the unopened default judgment. The Arbitrators awarded Kalatschinow $25,000.00 in damages and Losier appealed to Common Pleas Court.

The dispute over Kalatschinow's discovery requests continued until March 6, 2002, when the Court entered sanctions against Losier by precluding him from opposing or introducing any evidence or testimony at trial or from cross-examining any witnesses.

Losier's sole proprietor, Picard Losier, complied with Kalatschinow's discovery requests and was deposed on April 5, 2002. A non-jury trial took place on June 3, 2002 and June 4, 2002. However, at trial on his damages claim, Kalatschinow failed to prove any economic damages and offered insufficient evidence in support of his claims for harm to his reputation or emotional distress. Nevertheless, the Court entered judgment for Kalatschinow and against Losier, awarding compensatory damages in the amount of $10,000.00 compensatory for harm to Kalatschinow's reputation and emotional distress, $17,000.00 on the basis of vicarious liability for the actions of Alex Pierre, and a separate award of $10,000.00 punitive damages against Losier.

On appeal, the Superior Court, at Docket No. 2993 EDA 2002, affirmed the trial court verdict, and in so affirming, relied on and adopted wholly the reasoning of the trial court's opinion.

The instant Petition for Allowance of Appeal to the [Pennsylvania] Supreme Court follows.

5. Statement of Reasons Relied Upon for Allowance of Appeal

A. THE LOWER COURT'S REFUSAL TO GRANT APPELLANT'S PETITIONS FOR RELIEF FROM DEFAULT JUDGMENT CONFLICTS WITH ESTABLISHED CASE LAW FROM ITS SISTER APPELLATE COURT AND WITH PRECEDENCE FROM WITHIN ITS OWN CASE LAW, AND ALSO CONFLICTS WITH THE RULES OF CIVIL PROCEDURE PROPOUNDED BY THE COMMONWEALTH OF PENNSYLVANIA SUPREME COURT.

The Court below adopted the reasoning of the trial court on this issue and affirmed based solely on the trial court's reasoning. Appellate Court Opinion, at 8-9. The trial court opinion, which the Court below adopted, declared that Appellant was not entitled to the benefit of Pa.R.C.P. 237.3, even though the petition for relief from default judgment was filed within seven days, because 1) the proposed pleading was a set of Preliminary Objections, and 2) that the proposed Preliminary Objections were filed separately and not directly attached to the petition. Trial Court Opinion, at 9-10.

Pennsylvania Rule of Civil Procedure 237. 3 states:

Relief From Judgment of Non Pros or by Default

(a) A petition for relief from a judgment of non pros or of default entered pursuant to Rule 237.1 shall have attached thereto a verified copy of the complaint or answer which the petitioner seeks leave to file.

(b) If the petition is filed within ten days after the the entry of the judgment on the docket, the court shall

> open the judgment if the proposed complaint or answer states a meritorious cause of action or defense.

Id. In support of its reasoning that the appellant's petition was properly denied because the proposed pleading was a set of Preliminary Objections, the trial court relied on the Explanatory Note to the Rule which suggests that "[a] defendant who seeks to file a pleading other than an answer is not entitled to the benefit of this rule..." Id.

The trial court acknowledged the existence of contrary case law, and specifically cited Peters Township Sanitary Authority v. American Home and Land Develop. Co., 696 A.2d 899 (Pa. Cmwlth. 1997) as standing for the proposition that preliminary objections may be proposed as a pleading accompanying a petition for relief of default judgment. Trial Court Opinion, at 10. This holding has also been subsequently affirmed in the Superior Court, in Atlantic Credit & Fin., Inc. v. Giuliana, 829 A.2d 340 (Pa Super. 2003), which declared, "We agree with this well reasoned analysis and conclusion of our learned colleagues of the Commonwealth Court that preliminary objections, rather than an answer, may be attached to a petition to open and in that fashion establish a meritorious defense." The appellate court's failure to conform to its own precedence was in error, and should be reversed. See Cohen v. Mirin, 729 A.2d 1236 (Pa.Super. 1999) (reversible error to refuse to open default judgment where petition was filed within the ten day period).

The Court further declared that, even if appellate (sic) had been permitted to propose preliminary objections in its attempt to [7] seek relief from the default judgment, its failure to attach the pleading to the petition was fatally flawed. Trial Court Opinion, at 10. The Court erroneously determined that the proposed preliminary objections were filed contemporaneously with the petition to enter default judgment, Trial Court Opinion, at 10, which was August 14, 2000. Docket Entries, at 5. However, the docket shows that the proposed preliminary objections were filed on August 21, 2000, contemporaneously with the Petition to Open Judgment and the Entry of Appearance, although the docket does not indicate whether they were actually stapled to the petition. See Docket Entries, at 5-6. However, said preliminary objections were

accepted for filing in tandem with the petition, in conformance with Rule 205.2. Clearly, then, the intent of Rule 237.3 was met; the trial court's reasoning was not supported by the evidence, and the appellate court's adoption of the reasoning was therefore an error and should be reversed.

B. THE LOWER COURT'S AWARD OF COMPENSATORY DAMAGES CONFLICTS WITH ESTABLISHED PRECEDENCE FROM WITHIN ITS OWN CASE LAW, AND IS NOT IN CONFORMANCE WITH PRECEDENCE SET BY THE COMMONWEALTH OF PENNSYLVANIA SUPREME COURT.

The Court below adopted the reasoning of the trial court on this issue and affirmed based solely on the trial court's reasoning. Appellate Court Opinion, at 8-9. In its opinion, the trial court noted that the appellee testified that two customers no longer patronize his restaurant and that he has lost 10% of his business trade. Trial Court Opinion, at 19. The court also acknowledged, however, that there was no explanation as to why [8] the two customers no longer patronize his business, especially considering that the same two customers testified at the arbitration on appellee's behalf. Trial Court Opinion, at 19. The Court also acknowledged that no evidence of the amount of appellee's business was presented, to enable a computation of the asserted 10% reduction. Trial Court Opinion, at 19. Faced with no evidence of liquidated damages to assess against appellant, the trial court awarded compensatory damages of $10,000.00 based on emotional distress and damaged to reputation. Trial Court Opinion, at 19.

In support of its reasoning, the trial court, and by adoption, the appellate court, relied on Cilo v. Shields, 33 Pa. D. & C. 4th 10 (Mifflin Co. C.C.P. 1996), a non-precedential opinion reported by the Court of Common Pleas of Mifflin County. Cilo, however, dealt with damage to the reputation of an attorney when accused of fraud by a disgruntled opponent. In the instant case, appellee offered no evidence of damage to his reputation beyond his own feeling that "His restaurant had a bad atmosphere about it as a result of the lawsuit." Trial Court Opinion, at 19. The award of damages for damage to reputation lacked support in the record

evidence and the trial court's findings of fact should therefore be reversed.

Likewise, the trial court's award of damages based on emotional distress, and the appellate court's adoption and affirmation, stands in opposition to this Honorable Court's precedence. While Bannar v. Miller, 701 A.2d 242 (Pa. Super.
[9] 1997) declared that expert testimony is not required to prevail on wrongful use of civil proceedings action alleging emotional distress, no guidance was given establishing the criteria for a finding of emotional distress. Such guidance, however, is set forth in cases such as Kazatsky v. King David , 515 Pa. 183, 527 A.2d 988 (1987). In Kazatsky, this Court endorsed an objective standard "for the recovery of damages which limited recovery for serious mental distress to situations where a reasonable person normally constituted would be unable to adequately cope with the mental stress engendered by the circumstances of the event." Id., citing Sinn v. Burd, 486 Pa. 146,168, 404 A.2d 672,683 (1979).

The courts below found only that appellee felt nervous, scared and embarrassed by the lawsuit. Trial Court Opinion, at 6, ¶16; 19. In point of fact, the trial court reported that appellee thought the lawsuit "was a joke." Trial Court Opinion, at 6, ¶16. None of the evidence rises to the level of "serioius mental distress" required for damages, and here is no evidence that the lawsuit induced emotional distress sufficient to incapacitate the appellee even it he had been unusually susceptible to stress. The trial court, and thus the appellate court, impermissibly extrapolated damages notwithstanding the absence of testimony regarding any adverse effect of business or social relations. Farnese v. Southeast Penna. Trans. Authority, 338 Pa. Super. 130, 487 A.2d 887 (1985) (party not entitled to inference of fact which amounts to conjecture or mere guess).

[10]

The award of damages based on emotional distress was therefore an error as a matter of law, and should be reversed.

C. THE LOWER COURT'S AWARD OF PUNITIVE DAMAGES CONFLICTS WITH THE ESTABLISHED PRECEDENCE FROM WITHIN ITS OWN CASE LAW, AND IS NOT IN CONFORMANCE WITH PRECEDENCE SET BY THE COMMONWEALTH OF PENNSYLVANIA SUPREME COURT

AND PRECEDENCE SET BY THE UNITED STATES SUPREME COURT; AND IS CONTRARY TO ADOPTED PUBLIC POLICY, RAISING A QUESTION INVOLVING AN ISSUE OF IMMEDIATE PUBLIC IMPORTANCE.

The Court below adopted the reasoning of the trial court on this issue and affirmed based solely on the trial court's reasoning. Appellate Court Opinion, at 8-9. The trial court recognized the instruction of Dean Witter Reynolds v. Genteel, 346 Pa. Super. 336, 499 A.2d 637 (1985), Trial Court Opinion, at 19-20, which held

> [P]unitive damages are proper when the act "imports insult or outrage, and is committed with a view to oppress or is done in contempt of plaintiff's rights....Punitive damages may be given when the act is done with reckless indifference, as well as, bad motive.... Punitive damages must be based on conduct which is malicious, wanton, reckless, willful or oppressive.... The imposition of damages to a civil defendant is appropriate only where the conduct complained of is especially egregious.... We must look at the act itself, together with the circumstances, including the motive of the wrongdoers and the relations between the parties.... "The state of mind of the actor is vital. The act, or failure to act, must be intentional, reckless, or malicious."

Id., at 347-48, 499 A.2d at 642-43. Punitive damages awards have also recently been addressed by the United States Supreme Court in State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408; 123 S.Ct. 1513; 155 L.Ed. 2d 585 (2003). The Campbell Court reiterated three (3) guidelines for reviewing punitive damage

awards first set forth in BMW of North America v. Gore, 517 U.S. 559 (1996). The fact finder is instructed to consider:

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Id., at 19. The first factor is the primary indicator as to the reasonableness of a punitive damages award. Pioneer Commer. Funding Corp. v. Am. Fin. Mortg. Corp., 797 A.2d 269,292 (Pa. Super. 2002). The analysis of this factor in the Campbell case is applicable to the instant case.

The first element of the Gore guidelines should be analyzed in a fashion set forth by the Supreme Court:

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortuous conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id., at 20. The Court further states that "[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of them all renders any award suspect." Id.

Here, the trial court relied solely on the allegations of the complaint to determine whether punitive damages were appropriate. Trial Court Opinion, at 21. Such a finding is contrary to the law set forth in Meikin v. Howard Hanna Co., Inc., 590 A.2d 1303 (Pa. Super. 1991), which states,

> An attorney who initiates a civil proceeding on behalf of his client or one who takes any steps in the proceeding is not liable if he has probable cause for his action...; and even if he has no probable cause and is convinced that his client's claim is unfounded, he is still not liable if he acts primarily for the purpose of aiding his client in obtaining a proper adjudication of his claim... Lawyers can safely act upon facts stated by their clients. They do not incur liability to third persons for filing civil proceedings when the evidence of those facts is later found not credible by the court or jury whose duty it is to try the case. Any other rule would impair the quality of the representation which a client is entitled to receive from his lawyer.

Id., at 1305, 1307. By contrast, the lower court's ruling, if established as precedential law, would have the effect of impairing the quality of services an attorney might provide a client, and is thus

[13]

The award of punitive damages was therefore an error as a matter of law, and should be reversed.

6.Appendix [omitted]

Opinion of the Superior Court of Pennsylvania of May 18, 2004
Opinion of the Court of Common Pleas of Philadelphia County of March 25, 2004.
Docket Entries
Pa. R.C.P. 237.3
Pa. R.C.P. Rule 205.2

Respectfully submitted,

/s/
Sharon Williams Losier, Esquire

PETITION FOR RECONSIDERATION OF PICARD LOSIER AND ASSOCIATES FILED IN THE PENNSYLVANIA SUPREME COURT

(PAGE NUMBERS OF ORIGINAL OF PETITION IN BRACKETS [ ] WITHIN AND AT TOP OF TEXT)

IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

GOGOL B. KALATSCHINOW	:	Filed Nov. 12, 2004
V.	:	
ALEX H. PIERRE	:	DOCKET NO.
PICARD LOSIER & ASSOCIATES: AND ANTHONY BOMBACI	:	286 EAL 2004

PETITION FOR RECONSIDERATION OF DENIAL OF PETITION FOR ALLOWANCE OF APPEAL

Petition for Reconsideration of the Order of the Supreme Court of Pennsylvania issued October 28, 2004, denying the Petition for Allowance of Appeal of Picard Losier and Associates

Picard Losier, Esquire
Picard Losier & Associates
1518 Walnut Suite, Suite 807
Philadelphia, PA 19102
215-790-9570

Attorney for Appellant
Picard Losier & Associates

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ORDER FOR WHICH RECONSIDERATION IS REQUESTED

And now, this 28th day of October 12004, the Petition for Allowance of Appeal of Picard Losier and Associates is DENIED.

STATEMENT OF GROUNDS FOR RECONSIDERATION

1. THE SUPERIOR COURT DENIED APPELLANT PICARD LOSIER AND ASSOCIATES DUE PROCESS AND EQUAL PROTECTION OF THE LAW, BY AFFIRMING THE TRIAL COURT'S DENIAL OF LOSIER'S PETITION TO OPEN DEFAULT JUDGMENT, ON THE BASIS THAT LOSIER SOUGHT TO FILE PRELIMINARY OBJECTIONS RATHER THAN AN ANSWER TO THE COMPLAINT. IN SO DOING, THE SUPERIOR COURT IGNORED CONTROLLING PRECEDENT IN THE CASE OF ATLANTIC CREDIT AND FINANCE, INC., V. CARMEN L. GUILIANA, 829 A.2D 340 (Pa. Super.) DECIDED ON JULY 11, 2003 ESTABLISHING THAT PRELIMINARY OBJECTIONS ARE A PROPER PLEADING BY WHICH A DEFENDANT MAY ARTICULATE A MERITORIUS DEFENSE WITH A PETITION TO OPEN DEFAULT JUDGMENT PURSUANT TO PA.R.C.P. 237.3.

Pa.R.C.P 237.3 provides in part that if a petition for relief from default judgment is filed within ten days after entry of the judgment on the docket, the Court "shall open the judgment if the proposed complaint or answer states a meritorious cause of action or defense." The Rule effectively mandates that the court open a judgment if the petition is filed within ten days of the judgment, and the answer or other responsive pleading states a meritorious defense. The requirement that the defense be meritorious means that the petitioner need only plead a defense which, if proven at trial, would justify relief. See Provident Credit Corp. v. Young, 446 A.2d 257,262 (Pa. Super. 1982).

Default judgment was entered against Losier on August 14, 2000. Losier filed its Petition for Relief from Default Judgment ('the Petition') on August 21, 2000-, seven days after entry of default judgment. Therefore, Losier's Petition

was timely filed. Losier also articulated a meritorious defense in both his initial Petition (R,261-267a) and his Motion for Reconsideration after the Court denied the initial Petition (R, 301a-306a). Losier articulated the following defenses:

1)Both parties in the underlying action had stipulated to the discontinuance of the action.

2) Plaintiff, by propounding discovery, had waived Losier's default.

3) Losier had probable cause to commence and continue the underlying action on grounds that Losier's associate attorney, Alex Pierre had relied upon statements of the Plaintiff in the underlying action as well as an affidavit from another person who claimed to have witnessed the incident in the underlying complaint.

The assertion of probable cause to initiate the suit based upon the attorney's reliance upon statements of his client is a meritorious defense. In Meiksin v. Howard Hanna Co., Inc., et.al., 404 Pa. Super. 417 (1991), *allocatur denied*, 528 Pa. 644, 600 A.2d 196, the Superior Court held that an attorney is not required to verify the accuracy of his client's statements prior to filing suit, and may rely in good faith upon the statement of facts made to him by his client. Accord Bannar v. Miller, 701 A.2d 242 (Pa. Super. 1997), appeal denied, 555 Pa. 706, 723 A.2d 1024; Broadwater v. Sentener, 725 A.2d 779 (Pa. Super. 1999), *reargument denied, appeal denied*, 753 A.2d 814; and Kit v. Mitchell, 771 A.2d 814 (Pa. Super 2001), *reargument denied, appeal granted in part, 790 A.2d 1017, appeal dismissed, 842 A.2d 368 (Pa. 2004).*

The Superior Court affirmed the trial court's decision to deny Losier's Petition upon the fact that Losier sought to raise his defenses via Preliminary Objections rather than an "Answer" to the Plaintiff's Complaint. In denying Losier's Petition, the trial court had cited a comment to Pa.R.C.P. 237.3 providing that "A defendant who seeks to file a pleading other than an answer is not entitled to the benefit of Rule 237.3...." However, both the trial court and the Superior Court erred as a

matter of law because the comments to Rule 237.3 (depriving the benefits of that Rule to those seeking leave to file Preliminary Objections) did not become effective until July 1, 2001, almost a full year after Losier filed his Petition to Open Default Judgment. At the time Losier filed his Petition, the Commonwealth Court's decision in Peters Township Sanitary Authority v. American Home and Land Development Co. , was the applicable rule of law concerning Pa.R.C.P. 237.3 Interpreting Rule 237.3 in *para material* with Pa.R.C.P. 1037 and 126, the Court held that a defendant may attach preliminary objections as a proposed responsive pleading to a Petition to Open Default Judgment. Peters Township, 696 A.2d at 901.

Furthermore, while the instant matter was pending before the Superior Court (E.D.Pa.), the Superior Court (M.D.Pa.) issued its opinion on the precise issue in the case of Atlantic Credit and Finance Inc. v. Guiliana, 829 A.2d 340 (Pa. Super. July 11, 2003). In Guiliana, the Superior Court wholly adopted [3] the reasoning of the Commonwealth Court in Peters Township, and reversed the Court of Common Pleas of Lancaster County, which had denied the appellant's Petition to open default judgment on the same grounds at issue instantly.

By retroactively applying a comment to a Rule of Civil Procedure that was not in effect at the time Losier filed its Petition, and ignoring both a well-reasoned decision of the Commonwealth Court in Peters Township, and a precedential decision of the Superior Court of the Middle District that wholly adopted the Commonwealth Court's prior decision, the Superior Court (E.D.Pa.) has denied appellant Losier due process ad equal protection of the laws under the United States and Pennsylvania Constitutions. It is imperative that this Honorable Court establish the correct interpretation of Pa.R.C.P. 237.3 for the Superior Court in all districts throughout the Commonwealth.

2. THE SUPERIOR COURT DENIED APPELLANT PICARD LOSIER AND ASSOCIATES DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN AFFIRMING THE TRIAL COURT'S AWARD OF COMPENSATORY DAMAGES TO APPELLEE FOR PECUNIARY LOSSES, HARM TO REPUTATION, AND EMOTIONAL DISTRESS, WHEN, THE

RECORD IN THE TRIAL COURT SHOWED THAT THE APPELLEE FAILED TO PRODUCE ANY EVIDENCE OF SPECIFIC PECUNIARY LOSSES, HARM TO HIS REPUTATION, OR EMOTIONAL DISTRESS AS THAT TERM WAS DEFINED BY THE PENNSYLVANIA SUPREME COURT IN KAZATSKY V. KING DAVID MEMORIAL PARK, 515 Pa. 183 (1987).

Under 42 Pa.C.S.A. section 8354, the Plaintiff bears the burden of proving damages for expenses, attorney's fees, harm to his reputation, specific pecuniary losses, and emotional distress. At trial on the foregoing issues, the appellee admitted that he had incurred no expenses and attorney's fees in the underlying matter. Appellee also failed to produce any specific pecuniary losses to his business. Although he stated that after the suit was filed he lost ten percent of his business, no evidence was ever admitted of the monetary value of the business either before or after the underlying suit was filed, from which the trial court could have calculated the specific amount of appellee's loss, and the trial court acknowledged as much (R, 250).

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Furthermore, in affirming the trial court's award of damages for emotional distress, based upon the Superior Court's holding in Shiner v. Moriarty, 706 A.2d 1228 (Pa. Super. 1998), appeal denied, 556 Pa. 639, 523 A.2d 346, the Superior Court has created a lesser burden of proof for plaintiffs claiming emotional distress in section 8351 actions that for plaintiffs claiming intentional infliction of emotional distress (IIED). In Shiner, the Superior Court summarily held, with scant discussion, that expert testimony is not required to prove emotional distress in suits brought pursuant to 42 Pa. C.S.A. 8351. In effect, the Superior Court created an exception to the rules, criteria, and definitions pertaining to emotional distress claims festablished by the Pennsylvania Supreme Court in Kazatsky v. King David Memorial Park, 515 Pa. 183 (1987). In Kazatsky, this Honorable Court set forth two bases for recovery of damages for emotional distress. First, the Court held that recovery should be limited to cases of "serious mental distress to situations where a reasonable person normally constituted would be unable to adequately cope with the

mental stress engendered by the circumstances of the event." 515 Pa. at 193 (other citations omitted). Second, "existence of the alleged emotional distress must be supported by competent medical evidence." 515 Pa. at 197.

In creating a lesser burden of proof for plaintiffs seeking damages for emotional distress in section 8351 cases than that required for plaintiffs in IIED cases, the Superior Court has rejected the Supreme Court's cogent and thoughtful analysis to achieve an objective standard of proof for the nebulous world of the subjective symptomology of a particular plaintiff. In so doing, the Superior Court has muddied the already murky waters of "emotional distress" claims.

Under the statutory construction Act, 1 Pa.C.S. § 1922 in ascertaining the intent of the legislature, the Court must presume that "the General Assembly does not intend a result that is absurd, impossible of execution, or unreasonable." 1 Pa. C.S. §1922(1). The trial court, and the Superior Court both erred in interpreting the words "emotional distress" so as to permit recovery of a large damage award predicated upon evidence of the slight emotional discomfort experienced by appellee in this case. Intervention by this Honorable Court is necessary to address, once and for all, what kind of evidence is sufficient to establish that a person has suffered "emotional distress" in all cases in which damages are recoverable for such an injury.

[5]

3. THE SUPERIOR COURT DENIED APPELLANT PICARD LOSIER AND ASSOCIATES DUE PROCESS IN AFFIRMING THE TRIAL COURT'S REFUSAL TO ALLOW LOSIER TO CROSS-EXAMINE APPELLEE ON HIS CLAIM FOR DAMAGES.

The trial court refused to allow Losier to cross examine appellee on the ground that Losier had failed to comply with previous discovery orders. However, two months prior to trial on appellee's damages hearing Losier complied with appellee's discovery request by submitting to a deposition and disclosing his financial records to appellee. Therefore, once Losier complied with the discovery orders, the rationale for the imposition of the

sanctions no longer existed, and the trial abused its discretion in refusing to rescind the sanctions.

The trial court also erred in determining that it lacked sufficient basis for rescinding the prior orders imposing sanctions. In general judges of coordinate jurisdiction sitting in the same case should not overrule each other's decisions; however, where there are exceptional circumstances, this rule can be disregarded. Commonwealth v. Starr, 664 A.2d 1326 (pa. 1995). Exceptiona (sic) circumstances include " a substantial change in the facts or evidence giving rise to the dispute involved...." Ibid.

Instantly, there was a change in the facts and evidence with respect to appellee's claim for damages. It was uncovered during discovery and the damages hearing that appellee had materially misrepresented the nature and amounts of his damages. Among other things, appellee claimed in his complaint and pre-trial memorandum, that in defending himself in the underlying action (Bombaci v. Sassafras) that he had incurred damages in excess of $50,000.00 (Plaintiff's complaint, R, 34a), and attorney's fees and other expenses in the amount of $ 5,000.00 (Plaintiff's pre-trial memorandum, R, 344a). It was revealed at the trial on appellee's damages claim, that appellee had not incurred any damages, attorney's fees, or other expenses in excess of $ 50,000.00.

Here was a case in which the plaintiff-appellee claimed that Losier had initiated and continued a complaint against him without probable cause, and at a hearing to assess appellee's damages, appellee admitted that he had misrepresented material facts in his complaint and pre-trial memorandum. Appellee's intentional misrepresentations to the court regarding the nature and amount of his damages was such a significant change in the facts of the case, that under the principles set forth in Starr, supra, the trial court [6] would have been justified in lifting sanctions previously imposed so that Losier could defend itself pursuant to the equitable doctrine of "unclean hands." At a minimum, due process demands that Losier should have been permitted to at least cross-examine appellee regarding all of his claims.

Since Losier's situation came squarely within the exception to the rule that courts of coordinate jurisdiction should not overrule each other, the trial court denied Losier due process and in refusing to lift the sanctions and allow cross-examination, and the Superior Court erred as a matter of law in affirming the trial court's decision.

4. THE SUPERIOR COURT DENIED APPELLANT PICARD LOSIER AND ASSOCIATES DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN AFFIRMING THE TRIAL COURT'S FINDING THAT APPELLANT PICARD LOSIER AND ASSOCIATES WAS VICARIOUSLY LIABLE FOR THE ACTIONS OF ASSOCIATE ALEX PIERRE, WHEN THE RECORD WAS DEVOID OF ANY EVIDENCE TO SUPPORT SUCH A FINDING UNDER THE CRITERIA ESTABLISHED BY THE PENNSYLVANIA SUPREME COURT IN SMALLICH V. WESTFALL, 440 Pa. 409, 269 A.2d 476 (1970).

The trial court held, and the Superior Court affirmed, that Losier is vicariously liable for the acts of his associate under the theory that " a master is a principal that is responsible for the acts of his agent, a servant on the basis of vicarious liability due to the nature of control retained by the master."(R, 253a).

Not every relationship of principal and agent forms the basis of vicarious liability of the principal for the acts of the agent. To establish tort liability of the principal for the acts of his agent, the plaintiff mus show that the agent was subject to the principal's control over the details of his performance of the task for which he was appointed. In Smallich v. Westfall, 440 Pa. 409, 269 A.2d 476 (1970), this Honorable Court made clear that only the degree of control involved in the master-servant relationship, a subspecies of agency, is sufficient to establish vicarious tort liability.

There is no evidence in the record to support the trial court's conclusion that the relationship of Losier and his associate, Pierre, was that of master and servant, or that Losier retained any control over [7] Pierre's handling of cases on Losier's behalf in general, or specifically with respect to the underlying case upon which appellee based his section 8351 action. The Court specifically restated that the testimonial evidence showed that Mr. Losier's associate Pierre:

1) handled all personal injury cases for the firm, no matter who generated the case;
2) handled the cases as he saw fit without being micro-managed; and

3) he was an independent contractor who received a percentage of the income he generated for the firm.

(Trial Court opinion, p.23). Under the standards set forth by this Court in Smallich, Losier did not have a master-servant relationship with Pierre, and did not retain that degree of control over Pierre's conduct of cases assigned to him sufficient to impose vicarious liability on Losier. Notwithstanding the total lack of evidence that Losier retained any degree of control over Pierre's actions in the underlying matter, the trial court nevertheless declared that Pierre was a "salaried employee" whose acts were committed in the course and scope of his employment of the firm, and imposed liability on Losier on those grounds alone. The trial and Superior Courts erred as a matter of law, and the judgments should be vacated, on the authority of this Court's opinion in Smallich.

5. THE SUPERIOR COURT DENIED APPELLANT PICARD LOSIER AND ASSOCIATES DUE PROCESS AND EQUAL PROTECTION OF THE LAW, IN AFFIRMING THE TRIAL COURT'S AWARD OF PUNITIVE DAMAGES, WHER THE RECORD SHOWED THAT THE TRIAL COURT DID NOT CONSIDER OR APPLY THE CONSTITUTIONAL PRINCIPLES AND GUIDELINES FOR AWARDING PUNITIVE DAMAGES SET FORTH BY THE UNITED STATES SUPREME COURT IN BMW OF NORTH AMERICA INC., V. GORE, 515 u.s. 559 (1996), AND STATE FARM MUTUAL AUTO INSURANCE CO. V. CAMPBELL, 2003 LEXIS 2713(2003).

In the interim between the time the trial court rendered its opinion (March 25, 2003) and appellant Losier appealed to the Superior Court, the United States Supreme Court rendered its decision in State State Farm Mutual Auto Insurance Co. V. Campbell, 2003 Lexis 2713(April 7,2003). Campbell reaffirmed the criteria established in BMW of North America v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d

809 (1996), which a court must consider in order to meet minimum due process requirements that prohibit grossly excessive damages. Gore and Campbell are applicable to the trial and appellate courts of this Commonwealth. In affirming the trial court's award of punitive damages, the Superior Court violated the due process requirements set forth in Gore and Campbell and entered a punitive damages award that was arbitrary, excessive, and disproportionate to the harm done.

Gore held that the due process clause of the Fourteenth Amendment to the United States Constitution prohibits a tortfeasor from excessive damage awards. The size of the award must be reasonably related to the state's interest in punishing and deterring the particular behavior and not the product of arbitrariness and unfettered discretion. Gore, 517 U.S. at 560-61, 116 S.Ct. at 1592, 134 L.Ed. 2d at 818. In Campbell, the Supreme Court set forth the factors a court must consider in determining whether a tortfeasor's conduct warrants imposing punitive damages, and the proper proportion that punitive damages should bear to the amount of compensable damages. The record reflects that in imposing punitive damages against Losier, the trial Court never considered Gore, and Campbell was decided after the trial court rendered its opinion. In affirming the trial court, the Superior Court also neglected to consider either Gore or Campbell.

Although the Supreme Court in Campbell was reluctant to set forth a bright line test for determining a maximum ratio of compensatory to punitive damages, the Court declared that "(w)hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Campbell, at 30-31. Here, the compensatory damages of $ 10,000 are substantial in comparison to the actual harm suffered by appellee. Yet the punitive damages awarded against Losier is almost three times the amount of compensatory damages. The record below showed that for the five year period from 1996 to 2000, Losier's average net yearly income was $103,970.00. The Court held that Losier is vicariously liable for the punitive damages award against Pierre in the amount of $ 17,000.00 and awarded punitive damages separately against Losier in the amount of $10,000.00, for a total of $ 27,000.00. This amount equals almost one-third of Losier's

average net income. In light of appellee's failure to prove that Picard Losier was personally involved in the initiation andor continuation of the underlying action, or that he directed Alex Pierre in the conduct of that action, and appellee's unsubstantiated economic and emotional damages, the Court's $ 27,000.00 [9] judgment for punitive damages was clearly excessive, grossly out of proportion to the actual harm suffered by appellee, arbitrary, capricious, and unreasonable.

Therefore, appellant Losier requests that this Court vacate the judgment of the Superior Court and remand to the trial court for rehearing on the issue of punitive damages in compliance with the standards of due process set forth by the United States Supreme Court in Gore and Campbell.

Respectfully submitted,

/s/ _____
PICARD LOSIER
Attorney for Appellant
Picard Losier and Associates

CERTIFICATION OF COUNSEL

I, Picard Losier, attorney for Picard Losier and Associates, certify that the foregoing Petition for Reconsideration of the Order denying the Petition of Allowance of Appeal is presented in good faith and not for the purpose of delay, and that the application is restricted to the grounds specified in Pa. R. of Appellate Procedure 1113(b)(1).

/s/
_____
PICARD LOSIER
Attorney for Appellant
Picard Losier and Associates

STATUTES AND CODES

WRONGFUL USE OF CIVIL PROCEEDINGS

§ 8351. Wrongful use of civil proceedings

(a) Elements of action.- A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings:

(1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery , joinder of parties or adjudication of the claim in which the proceedings are based; and

(2) The proceedings have terminated in favor of the person against whom they are brought.

(b) Arrest or seizure of person or property not required. – The arrest or seizure of the person or property of the plaintiff shall not be a necessary element for an action brought pursuant to this subchapter.

§ 8352. Existence of probable cause.

A person who takes part in the procurement, initiation, or continuation of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either:

(1) Reasonably believes that under those facts the claim may be valid under the existing or developing law;

(2) Believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information; or

(3) Believes as an attorney of record, in good faith that his procurement, initiation or continuation of a civil cause is not intended to merely harass or maliciously injure the opposite party.

§ 8353. Damages

When the essential elements of an action brought pursuant to this subchapter have been established as provided in section 8351 (relating to wrongful use of civil proceedings), the plaintiff is entitled to recover for the following:

(1) The harm normally resulting from any arrest or imprisonment, or any dispossession or interference with the advantageous use of his land, chattels, or other things, suffered by him during the course of the proceedings.

(2) The harm to his reputation by any defamatory matter alleged as the basis of the proceedings.

(3) The expense, including any reasonable attorney's fees, that he reasonably incurred in defending himself against the proceedings.

(4) Any specific pecuniary loss that has resulted from the proceedings.

(5) Any emotional distress that is caused by the proceedings.

(6) Punitive damages according to law in appropriate cases.

§ 8354 Burden of proof

In an action brought pursuant to this subchapter the plaintiff has the burden of proving, when the issue is properly raised:

(1) The defendant has procured, initiated, or continued the civil proceedings against him.

(2) The proceedings were terminated in his favor.

(3) The defendant did not have probable cause for his action.

(4) The primary purpose for which the proceedings were brought was not that of securing the proper discovery, joinder of parties, or adjudication of the claim on which the proceedings were based.

(5) The plaintiff has suffered damages as set forth in section 8353 (relating to damages).

1980, Dec. 19, P.L 1296, No. 232, § 1, effective in 60 days.

ORDER OF THE SUPREME COURT DENYING PETITION FOR RECONSIDERATION

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

GOGOL B. KALATSCHINOW	:	
W.	:	
ALEX H. PIERRE	:	DOCKET NO.
PICARD LOSIER & ASSOCIATES: AND		286 EAL 2004
ANTHONY BOMBACI	:	

ORDER

And now, this 15th day of December 2004, the Petition for Reconsideration of Picard Losier and Associates is DENIED.

Supreme Court, U.S.
FILED

041589 MAR 15 2005

OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PICARD LOSIER
(d/b/a Picard Losier & Associates)
Petitioner

V.

GOGOL KALATSCHINOW
Respondent

On Petition For a Writ of Certiorari
To
The Supreme Court
of the
Commonwealth of Pennsylvania

SUPPLEMENTAL APPENDIX

Picard Losier d/b/a
Picard Losier & Associates
1518 Walnut Street, Suite 807
Philadelphia, PA 19102
215-790-9570

SUPPLEMENTAL APPENDIX
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J-A34011-03

NON-PRECEDENTIAL DECISION-SEE SUPERIOR COURT I.O.P. 65.37

GOGOL KALATSCHINOW, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ALEX H. PIERRE, ESQUIRE, PICARD LOSIER & ASSOCIATES AND ANTHONY BOMBACI, Appellants	:	
APPEAL OF: PICARD LOSIER & ASSOCIATES,	:	No. 2993 EDA 2002

Appeal from the Judgment Entered October 30, 2002
In the Court of Common Pleas of Philadelphia Couinty
Civil at No. 0917 June Term, 2000

....

BEFORE: STEVENS, OLSZEWSKI, and BECK, JJ.

MEMORANDUM: **FILED MAY 18, 2004**

....

Judgment Affirmed, in part; Vacated, in part; Remanded; Jurisdiction Relinquished.

Judgment Entered.

/s/ David A. Szewczak
Prothonotary

Date: May 18, 2004

I N THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

GOGOL B. KALATSCHINOW	:	NO. 286 EAL 2004
	:	
v.	:	Petition for Allowance of
ALEX H. PIERRE, PICARD	:	Appeal from the Order of
LOSIER & ASSOCIATES,	:	the Superior Court
AND ANTHONY BOMBACI	:	
	:	
PETITION OF: PICARD LOSIER	:	
& ASSOCIATES	:	
	:	

ORDER

PER CURIAM

AND NOW, this 28th day of October 2004, the Petition for Allowance of Appeal is DENIED.

TRUE COPY FROM RECORD

Attest OCT 28 2004

/S/ Patricia Johnson
Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania,
Eastern District